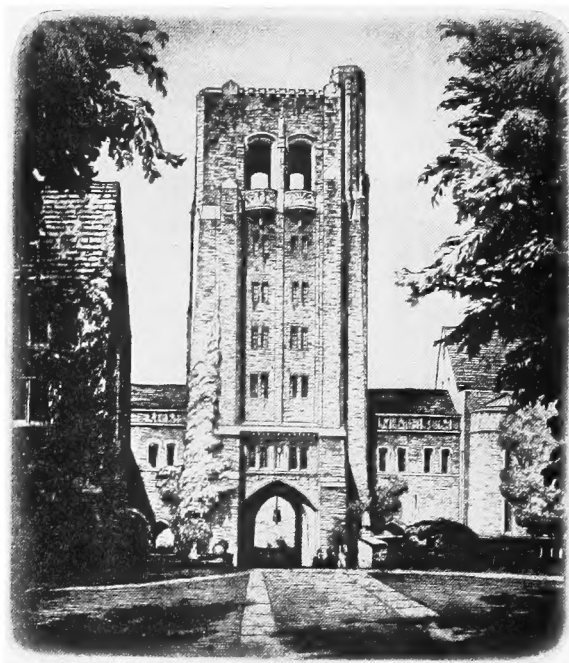


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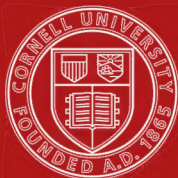


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OUTLINES OF EQUITY,

BEING

A SERIES OF ELEMENTARY LECTURES ON
EQUITY JURISDICTION,

DELIVERED AT THE REQUEST OF THE INCORPORATED LAW SOCIETY;

WITH

SUPPLEMENTARY LECTURES ON CERTAIN DOCTRINES
OF EQUITY,

AND

A LECTURE ON THE SUBJECT OF FUSION.

BY

FREEMAN OLIVER HAYNES,

OF LINCOLN'S INN, BARRISTER-AT-LAW,

FORMERLY FELLOW OF CAIUS COLLEGE, CAMBRIDGE.

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TO
THE RIGHT HONOURABLE
JOHN LORD ROMILLY
&c. &c. &c.
WHO
WHILE INHERITING A NAME
ALREADY ILLUSTRIOUS IN OUR LEGAL ANNALS
HAS HIMSELF ASSOCIATED THAT NAME WITH THE ANCIENT DIGNITY OF
MASTER OF THE ROLLS
THE FOLLOWING OUTLINES OF EQUITY
ORIGINALLY SKETCHED FOR THE INSTRUCTION OF
ASPIRANTS TO A PROFESSION
OVER WHICH HIS HIGH OFFICE GIVES HIM A SPECIAL SUPERVISION
ARE
WITH PERMISSION
MOST RESPECTFULLY INSCRIBED.

PREFACE.

A NEW Edition of these Lectures having been called for, my first care was to ascertain whether, notwithstanding the legal decisions and statutory enactments of the last seven years, they could still be considered useful to those for whose information they were originally published.

The result of a careful reperusal of them was to satisfy me that, except in respect of the alterations introduced by the Married Women's Property Act, 1870, and those infused into the practice of the Court of Chancery by the 25th & 26th Vict., cap. 42 (Rolt's Act), the text might be treated as little affected by the lapse of time ; and the Lectures have, therefore, been reprinted with notes explaining the effect of subsequent legislation and referring to the recent decisions applicable to the questions discussed.

An Elementary Lecture on the subject of " Fusion,"

delivered while the present Edition was passing through the press, has been added.

I have to thank my son, Mr. Edmund C. Haynes, Fellow of Queens' College, Cambridge, for assistance in correcting the press, and for useful hints as respects the notes.

F. O. HAYNES.

15, OLD BUILDINGS, LINCOLN'S INN.

January 1, 1873.

PREFACE TO THE FIRST EDITION.

THE following pages are little more than the reproduction in print of a Course of Elementary Lectures on Equity, recently delivered at the request of the Incorporated Law Society.

It has been represented to me by friends of my own profession, who have read my Lectures, that the publication of them is likely to be useful; that, while a voluminous treatise alarms a beginner, a condensed manual, containing often in a single sentence the abstract result of a mass of decision, is beyond his strength; and that the following sketches are well suited to convey elementary knowledge in Equity, both to gentlemen reading in Barristers' Chambers, and to students such as those to whom my oral teaching was addressed.

It has been further suggested to me, that some outlines of our Equity system may be useful to University undergraduates, who have selected law as

part of their curriculum, and interesting to educated laymen of maturer years.

Finally, should my friends have formed a mistaken estimate of the general utility of my performance, it is, perhaps, not too much to presume, that at least those individual gentlemen to whom my Lectures were delivered may derive advantage from refreshing their memory by a perusal of them.

PREFACE TO THE SECOND EDITION.

THE anticipations expressed by the Author in his Preface to the former Edition of these Lectures have in some respects been surpassed, his work having been thought of sufficient merit to warrant its adoption as a class-book for Bar Students. He has, in consequence, while preparing a Second Edition, now called for, ventured to assume that there is a real need on the part of students beginning their law reading for accurate information respecting Equity, conveyed in a less condensed form than is commonly adopted by elementary treatises ; and, so assuming, he has included in this Edition four Lectures (part of a second course) on the equity doctrines of "Election," "Satisfaction," and "Conversion."

No attempt has been made to alter or re-write any portion of the Lectures, so as to adapt them (in the few cases needful) to the subsequent alterations in the law, the Author finding it distasteful to write, in

the style suited for oral delivery, matter not in fact intended to be used orally; but notes, with references to subsequent cases, have been added for the assistance of students.

But probably, to the student class of readers, the most valuable addition now made will be found to be Mr. Barber's statement on Equity Practice and Procedure, which is reprinted from the Parliamentary Papers, and to which the Author of the Lectures has appended some notes and references.

As part of the endeavour to improve the book for educational purposes, a Table of Cases has been prefixed.

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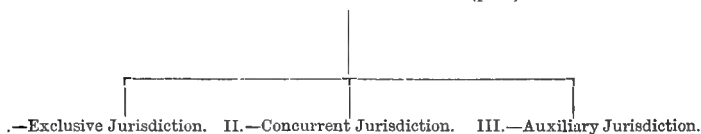
TABULAR ANALYSIS*

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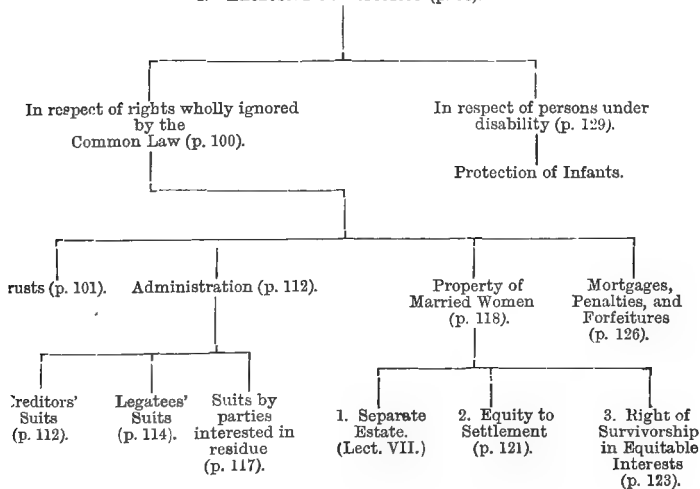
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EQUITY.

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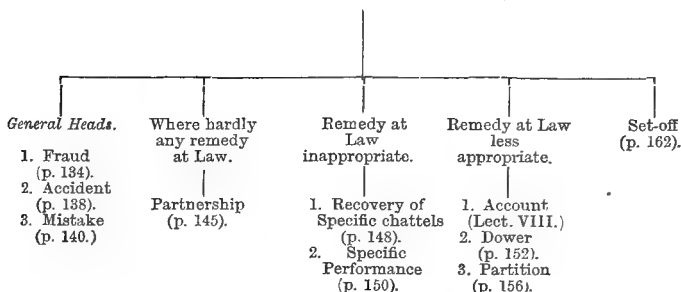


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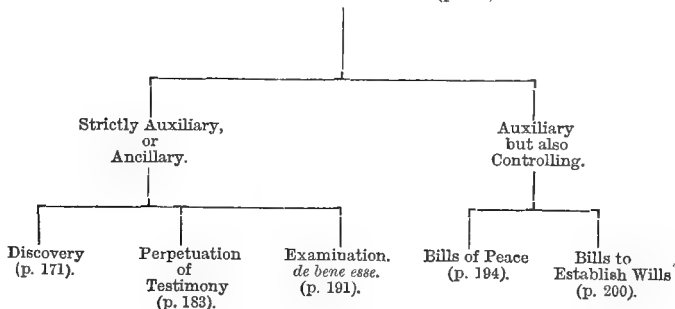


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OUTLINES OF EQUITY.

LECTURE I.

GENTLEMEN,—The task which, at the invitation of the Council of the Incorporated Law Society, I have undertaken to perform, is one, the satisfactory and efficient fulfilment of which seems to me by no means easy. The limited extent of time afforded by twelve lectures of one hour each, and the vast range of the subject-matter, render condensation and selection alike necessary and difficult.

Where condensation is my aim, I shall doubtless appear, sometimes needlessly elementary to the more advanced students amongst you, and sometimes obscure to those who are beginners merely; and in dealing with particular heads of equity jurisdiction specially selected for consideration, the absence of a previous exposition of other heads closely connected with them must, I fear, occasionally lead to imperfect results.

Nor is the general question, *How to lecture usefully?* of easy solution (a). That lectures made be made an

(a) The following observations on the subject of oral teaching have lost their significance now that the voice has assumed the literal form; but they are retained because it would be difficult to expunge them without breaking the thread of the discourse; and possibly the reader may find them not altogether uninteresting.

efficient auxiliary in legal training can hardly be doubted, if for no other reason, at least as constituting a separate and distinct mode of instruction. Indeed, if I were asked by any one amongst you the surest means of acquiring legal knowledge, I should answer : All are valuable ; neglect none ; vary your modes of study. *Novelty* arrests the attention ; and attention firmly riveted results in impressions firmly fixed. After reading text-books, which, however useful, commonly leave but faint reminiscences, the full report of a single case, with all its incidents, may fix itself, *with the principle involved*, indelibly on the memory. So after theoretical study, in all its varieties, the perusal of a particular set of papers in practice, and the actual handling of the matter, will, for the first at least, impress upon the worker's mind tenfold more strongly than any mere theoretical reading could do, the points of law actually involved and considered. Again, the first arguments and judgments heard in open court, the earliest consultations of counsel which may be attended, convey lessons not easily forgotten. Every avenue, in fact, to legal, as to other, knowledge possesses, *cæteris paribus*, in proportion to its novelty, a greater prospect of fixing in our treacherous memories those principles which so readily elude us.

It must be understood that I am here dealing only with the question of the bare acquisition of sound legal knowledge ; an object most important in itself, but one which, when attained, forms part only of the practical lawyer's education. In practice, far more than sound legal knowledge is required. The habit of rejecting

rapidly those facts which are immaterial, and retaining for further consideration those which are or may be important, is, perhaps, more necessary for the despatch of business than even sound theoretical knowledge itself. In fact, theoretical knowledge must be made the means and not the end,—the handmaid and not the mistress. Many of you will, doubtless, find at first, when you proceed to the active exercise of your duties—and amongst these not a few of the most diligent and of the best read—that the perusal of a set of papers, or the hearing of a particular statement, will immediately suggest various heads of legal difficulty. You will then, perhaps, resort prematurely to your books, sift the law thoroughly, and sitting down again, discover, to your mortification, some trifling fact which renders nugatory (so far at least as respects the matter in hand) your elaborate legal investigation. I conceive, indeed, that to a young practitioner, fairly read, no better advice could be given on commencing practice than *this* :—“Avoid, as a general rule, considering the law of the case until you have thoroughly mastered the facts.”

But I am digressing rather. I was attempting to show that, in the acquisition of legal knowledge, novelty of mode formed an important aid. And it is chiefly on this account that I think “lectures” valuable. For, as compared with other means of instruction, it is obvious that they labour under some degree of disadvantage.

Socrates, in the “Phædrus,” is represented as ingeniously showing the imperfection of instruction conveyed by books, as compared with the oral instruction of the ancient philosophers.

He says:—"Writing is something like painting. The creatures of the latter art *look* very like living beings; but if you ask them a question, they preserve a solemn silence. Written discourses do the same. You would fancy, by what they say, that they had some sense in them; but if you wish to learn, and therefore interrogate them, they have only their first answer to all questions. And when the discourse is once written, it passes from hand to hand among all sorts of persons, those who understand it and those who cannot. It is not able to tell its story to those only to whom it is suitable; and when it is unjustly criticised, it always needs its author to assist it, for it cannot defend itself.

* * * * *

"There is another sort of discourse which is far better and more potent than this.

"*Phædr.*—What is it?

"*Soc.*—That which is written scientifically upon the learner's mind. This is capable of defending itself, and it can speak itself, or be silent, as it sees fit.

"*Phædr.*—You mean the real and living discourse of the person who understands the subject, of which discourse the written one may be called the picture.

"*Soc.*—Precisely so." (a)

It might have been retorted, though with less fairness than than now in the days of the printing-press, "*Litera scripta manet.*" The written discourse remains, and may be referred to from time to time as occasion may require; while the orally taught pupil, after he has

(a) For a later translation of high authority, see Jowett's "Dialogues of Plato," vol. i. p. 611.

retired from the presence of his oral instructor, must first re-demand from his memory the precise words of his teacher, and then weigh their value.

But, however this may be, it must be confessed that the modern lecturer can boast neither the advantage of that permanency which belongs to written instruction, nor the power of exposition and explanation so highly prized by the Athenian philosopher. The former advantage is denied to him by the very nature of his calling; the latter, in the case of public lectures at least, by the number of his audience.

The question still remains, What *can* be usefully accomplished by public lectures? I should answer; that the first principles of any science may be introduced to the minds of the hearers more readily than by books merely; that general conceptions of the subject-matter in hand may be conveyed (incomplete necessarily, because qualifications must be neglected, but) more vividly than could be gained from the introductory pages of a scientific work; and that, by a somewhat bold generalization and *quasi*-popular handling of the subject, the interest of the hearers may be awakened to search for themselves whether these things are so. In my own case I shall be perfectly satisfied if, by hearing my lectures, gentlemen are induced to explore the mines of learning contained in Mr. Spence's work (a), and in the two other treatises mentioned at the foot of the prospectus (b). They will at once perceive how largely I have entered into the labours of those who

(a) The Equitable Jurisdiction of the Court of Chancery.

(b) Story's Equity Jurisprudence, and Lewin on Trusts.

have gone before me ; but not, I can assure them, without labouring myself. Indeed, it is of the essence of legal study to take nothing for granted—to trace out laboriously to their original sources the knowledge or the error of those who have gone before. He who would learn law must plod, must dig. Would that, while conscious of some capacity for digging and plodding myself, I felt equally sure of my power of lecturing after the manner which, so far as I can judge, is alone likely to be useful.

Respecting the general plan of my lectures, I am not aware that I can add much to the information afforded by the prospectus already issued (*a*).

In every system of jurisprudence we have, (1.) the system itself ; (2.) the functionaries by whom it is administered ; and (3.) the procedure by which they administer it. Without some general information on *each* of these heads, it would obviously be impossible to pass to the more particular consideration of any one. This explains the selection of the subjects of my first three lectures. The next three are intended to present a somewhat more complete view of equity jurisprudence in general. The rest of the prospectus may be left to speak for itself.

Well, then, the subject of my present lecture is the general nature and extent of equity jurisprudence, and the classification of the different heads of equity.

And, first, what is *equity*, in the legal technical sense of the word ? Not, of course, the equity referred to in

(*a*) See "Table of Contents," which, as to the first nine Lectures, was copied from the "Prospectus."

Sacred Writ, as “equity and every good path.” That is not to be hoped for, nor can it be enforced in our present imperfect state. The man who, from vindictive motives, cuts off his son with a shilling, and leaves his property to strangers, abuses most grossly the rights conferred on him by the policy of our law, but does nothing that renders him accountable in equity. The man who, surrounded by every luxury, a *millionnaire* himself, should choose to allow to an aged father, formerly affluent, but now destitute, a pittance, of say 15s. a week, would satisfy the positive enactments of the Poor Law, and be amenable to no court of equity. Equity, in the technical sense, is therefore at the utmost but a *portion* of equity or natural justice in the larger sense. There are many duties, many obligations (imperfect they are commonly called), which no civilised country attempts to enforce judicially. Between these and obligations which may be so enforced, there is a line of demarcation varying not very much in different countries. The non-enforceable portion of natural justice forms, therefore, no part of technical equity.

The next question is, Does technical equity or equity jurisprudence represent *the whole* of that portion of equity which may be enforced? Not so. A large portion of this enforceable part of equity lies within the competency of our courts of law. Equity, technically speaking, is that portion of equity in the larger sense or *natural justice*, which, though of such a nature as to admit properly of its being judicially enforced, was omitted to be enforced by our common

law courts—an omission which was supplied by the Court of Chancery. The distinction between equity in the technical sense and law, is truly matter of *history* and not matter of *substance*.

The strongest argument in support of this assertion is that derived from the fact, that in our country alone (I except, of course, such of the American states as have inherited or adopted our equity system) are to be found the double jurisdictions in law and equity. The short sum of the matter is this,—that the Court of Chancery recognises certain rights and applies certain remedies, which the courts of law might have equally recognised and applied, but did not.

But why, I hear some of you ask, did the common law courts thus fall short in the performance of their judicial duties? Here, too, the answer is matter of history. According to the common law, every species of civil wrong was supposed to fall within some particular class, and for each class an appropriate writ existed, or was supposed to exist. The writ was (as you know it still is), in common law actions, the first step. Thus, if a man had suffered an injury, it was not competent to him to bring before the court of law the facts of the case, leaving it to the court to say whether the case was one deserving redress; but he had first to determine within what class of wrong his case fell, and then apply for the appropriate writ.

The evil effects of this system of procedure were mainly two.

First. Even where the facts were such as to bring the case of wrong within some one of the classes

already recognised as remediable at common law, the injured suitor was exposed to the risk of selecting an improper writ, and failing in his action on that account. This, indeed, was a fertile source of injustice in common law proceedings, even within the last few years; in fact, until the Common Law Procedure Act of 1852, which enacted "that it should not be necessary to mention any form of action in the writ of summons" (a). Thus, before the late Procedure Act, it often happened that a man sued in "debt" when he ought to have sued in "assumpsit," or in "trespass" when he ought to have selected "case." He incurred, perhaps, great expense; and although proving at the trial facts showing him to be entitled to a common law remedy, yet failed because he had selected the wrong form of action. Take as an illustration the case of *Sharrod v. London and North-Western Railway Company* (b). There the action was one against a railway company for running over some sheep with a railway engine. The sheep had strayed on to the railway through defect of fences; and there can be little doubt, though the report does not expressly so state, that the fences were, in fact, fences which the company was bound to keep in repair, and that the owner of the sheep had a substantial right of action against the company. The plaintiff's legal advisers (somewhat carelessly, it would seem to me) brought trespass. It was held, most correctly no doubt if I may say so without presumption, that *trespass* would not lie; that if the cattle had a right to be on the railway, the remedy was by an

(a) 15 & 16 Vict. cap. 76, s. 3.

(b) 4 Exchequer R. 580.

action on the case for causing the engine to be driven in such a way as to interfere with that right; that if the cattle were altogether wrong-doers, there was no neglect or misconduct for which the company were responsible; but that if the cattle escaped through defect of fences which the company should have kept up, their damage was consequent on that wrong, and recoverable in an action on the case against the company, for letting their fences be incomplete, or out of repair. In this case there can be hardly any reasonable doubt but that if the plaintiff had been allowed simply to state the facts of his wrong, apart from any technical form of action, and to support that statement by evidence, he must have succeeded against the railway company at the outset, instead of being obliged to resort (assuming him to have had the courage to do so) to the costly expedient of a second action.

But the injustice thus occasioned by the necessity for selecting a form of writ, even where the wrong was plainly one of common law cognisance, falls strictly within the pale of the common law; and perhaps I have already devoted too much time to the consideration of an evil attaching to the old common law procedure, which, after all, is only indirectly connected with the subject of my present lecture, viz., Equity.

Secondly. The other evil alluded to—and it is with this one that we are concerned, as having, in my opinion, mainly given rise to our equity jurisprudence—was the general cramping operation of the common

law procedure by writs, in the instances of those civil wrongs which did not fall distinctly within any ascertained common law class. After selecting his form of action, the plaintiff might fail, not from having made an erroneous selection, but because the wrong done was of a class not referable to any hitherto known class of remedy. In this case there was an absolute denial of justice. The plaintiff would have equally failed, had he sued in any other form. And frequently a man might abstain from suing altogether, feeling it to be hopeless to select a form of action suitable to his grievance. The heavy fetters of such a procedure could not fail to be early felt. The system was, in fact, incapable of expansion, or of adaptation to the growing wants of society. So long ago as the thirteenth year of Edward the First's reign, a remedy was attempted. At that time actions at law in fact commenced with an original writ sued out in Chancery; though at a later date the common law courts contrived practically to dispense with the necessity for suing out these original writs. The drawing up of these writs was part of the business of the Clerks (better known afterwards as the Masters) in Chancery. An attempt was made to mitigate the latter of the two evils, which I have just explained, by giving a larger discretion and enjoining a greater activity in the framing of new writs. It was accordingly enacted (*a*), that "whensoever from henceforth it shall fortune in "the Chancery, that in one case a writ is found, and in "like case falling under like law and requiring like

(*a*) 13 Edward I. stat. 1, cap. 24.

“remedy is found none, the clerks of the Chancery
“shall agree in making the writ ; or the plaintiffs may
“adjourn it until the next Parliament, and let the
“cases be written in which they cannot agree, and let
“them refer them unto the next Parliament, and by
“agreement of men learned in the law, let a writ be
“made, lest it should happen that the court should
“long time fail to minister justice unto com-
“plainants.”

This enactment, though well intended, proved wholly inadequate. The Clerks in Chancery made little or no use of the new powers conferred. It was hardly to be expected they should. They were ecclesiastics, knowing little of the common law. There was no encouragement to them to make any attempt to frame new writs, since the common law courts were the sole judges of the validity of these writs when framed. And it cannot be doubted that any new writs adequate to newly-occurring emergencies, based as they must have been on the Roman law, would immediately have aroused the jealousy of the common law judges, and have been treated as invalid.

The Act, therefore, remained, to a considerable extent, a dead letter ; and, but for some interposition, right and justice must have been stifled by a system of procedure which Sir William Blackstone seems to have thought deserving of eulogium (*a*).

The common law courts thus falling short in the administration of justice, those who suffered wrongs for which the common law afforded no redress applied

(*a*) Bl. Com. vol. iii. 183, 184.

either to the King in Parliament or to the King in Council, who referred these matters to the Chancellor. Thence grew up a practice of applying to the Chancellor directly, who, perceiving how hopeless it would be to attempt to remedy the wrongs brought before him by framing new writs, took upon himself to apply an immediate remedy, by ordering the defendant to do, and compelling him to do, what he (the Chancellor) considered to be right in equity and in conscience.

Such, according to the best of my research, is the origin of our equity jurisprudence.

Considering that origin, it is hardly to be expected that either its nature or extent should be capable of any concise general definition. To convey an accurate notion of the nature and extent of equity jurisprudence, requires little less than a statement of the cases in which, and the circumstances under which, the Court of Chancery interposes to mitigate the hardships and inconveniences of the common law. Indeed, on referring to the text books, you will observe wide differences of opinion amongst the most eminent jurists respecting the principles upon which equity interposes—differences which can be accounted for only by admitting that the doctrines and principles of the Court have varied from time to time. Thus, you will find Lord Bacon, Mr. Ballow, in the treatise known as “*Fonblanque on Equity*,” and the earlier theoretical writers, attributing to the equity jurisdiction far larger and more uncontrolled powers than later writers have been willing or able to recognise. Lord Bacon, for instance, in his “*De Augmentis Scientiarum*,” liber 8,

aphorism 35, assigns to the courts of equity the power both of mitigating the rigour and supplying the defects of the law. His words are, “Habeant similiter curiæ
 “prætoriæ potestatem tam subveniendi contra *rigorem*
 “legis quam supplendi *defectum legis*.” And there can, I think, be no doubt that the early foundations of our equity system were laid by chancellors who assumed to themselves and exercised powers fully as large as that ascribed by Lord Bacon. On the other hand, the jurists of more recent times, writing when the edifice had already risen into something like shape and proportion, have denied the existence of those larger principles of jurisdiction. Sir William Blackstone observes,—“In the first place it is said, that it
 “is the business of a court of equity to abate the
 “rigour of the common law. But no such power is
 “contended for.” And the learned writer proceeds to give various instances of common law hardship, which the equity courts had not interfered to alleviate (*a*). These discrepant views represent truly the equity doctrines of two different epochs. For the first *creation* of the equity system, principles of jurisdiction as extensive as those enunciated by Lord Bacon were absolutely necessary; for the mere *development* of it, more moderate powers were sufficient.

The history of the growth and development of equity jurisdiction is, indeed, by no means, as sometimes supposed, that of a gradual, slow encroachment. On the contrary, turning to the earliest records, we see, at first, the chancellors trying apparently to redress every

(*a*) Bl. Com. vol. iii. 430.

grievance of whatever nature, which would otherwise be remediless; while the labours of the more recent judges consisted, not merely in developing heads of equity already founded, but in pruning the luxuriance of the earlier jurisdiction.

In illustration of this position, let me turn to the book which I now take up, and which contains the most authentic information we possess respecting the early proceedings in Chancery. It is the first volume, "Calendars in Chancery of Queen Elizabeth," printed by order of the Record Commissioners. Prefixed to the Calendars is contained a selection of bills and petitions, of dates anterior to Queen Elizabeth's reign, accompanied, in the later instances, by the answers, replications, and depositions of the witnesses. The general character of these early proceedings is in the preface to the publication thus described: "Most of these ancient petitions appear to have been presented in consequence of assaults and trespasses and a variety of outrages which were cognisable at common law, but for which the party complaining was unable to obtain redress, in consequence of the maintenance and protection afforded to his adversary by some powerful baron, or by the sheriff, or by some officer of the county in which they occurred." I need hardly observe to the youngest beginner amongst you, that any such cause for coming into equity has long since ceased to exist; and even if any such in fact existed, it would clearly at the present day constitute no ground for equitable interposition.

The latitude of jurisdiction assumed by the early

chancellors, will, however, be best shown by the selection of a few instances from the book before me (a).

But, in truth, we find considerable inaccuracy of opinion, respecting the true functions of equity, prevailing at a much later date than that of these precedents. Thus, the celebrated confidential adviser of Henry the Seventh, Archbishop Morton (b), appears, according to a report in the Year-Books, to have denied even the distinction between "technical equity" and "equity in the sense of natural justice." The report of the case, which is noticed by both Mr. Spence and Lord Campbell, is rather curious. It appears that one of two executors, colluding with a debtor to the testator's estate, had released the debtor. The co-executor filed a bill against the executor and the debtor. The Chancellor was disposed to give relief. Fineux, counsel for the defendant, observes, "that there is the law of the land for many things, and

(a) The following cases were then read :—

1stly, p. xx.—"Kymburley v. Goldsmith. A common case of action for non-delivery of woad."

2dly, p. xli.—"Appilgarth, widow, v. Sergeantson. Bill complaining that defendant, having obtained a sum of money of plaintiff, giving her to understand he intended to marry her, has married another woman, and refuses to return the money." See this case, Appendix A.

3rdly, p. xxiv.—"Henry Hoigges v. John Harry. Bill by plaintiff, an attorney, to restrain the defendant, a priest, from practising witchcraft against him." See this case, Appendix B.

The two first cases obviously present no ground for equitable interposition. The third, viewing witchcraft as a reality, was in substance a bill for protection against a criminal outrage, a species of suit wholly inadmissible at the present day.

(b) Bacon, in his *Essay on Counsel*, says that Henry the Seventh, in his greatest business, imparted himself to none except Morton and Fox.

“ that many things are tried in Chancery which are
“ not remediable at common law, and some are merely
“ matter of conscience between a man and his con-
“ fessor,” thus pointing out accurately the distinctions
between law, equity, and religion. But the Chancellor
retorts: “ Sir, I know that every law is, or ought to
“ be, according to the law of God ” (ignoring thus
altogether any distinction between law and religion);
and then, merging completely the chancellor in the
archbishop, he continues: “ and the law of God is,
“ that an executor, who is evilly disposed, shall not
“ waste all the goods, &c. And I know well, that if
“ he do so, and do not make amends if he have the
“ power, il sera damne in hell.” And then the Chan-
cellor proceeds to lay down some rather unsound
law (a). But I would recommend those of my hearers
who would wish clearly to understand and appreciate
how the wave of Chancery jurisdiction first swelled
and threatened to advance beyond due bounds, and
then gradually receded, to read carefully that portion
of Mr. Spence’s work which treats of the now obsolete
jurisdiction of the Court of Chancery (b). I am not
aware that the subject has been systematically con-
sidered elsewhere.

If, then, it be historically true that our present
equity jurisdiction is only the ultimate result of the
development of principles varying in different cen-
turies, it must obviously be impossible to convey any
satisfactory view of equity which does not, in sub-

(a) Year Book, 4 Henry VII. fo. 5.

(b) Spence’s *Equitable Jurisdiction*, vol. i. p. 684.

stance, amount to an enumeration of the particular heads of jurisprudence gradually evolved by the labours of our successive chancellors.

But some faint general notion of the functions and limits of equity may perhaps be conveyed by enunciating, and elucidating by example, a few of the leading maxims or principles of equity. I will select four—three of an enabling, and the fourth of a restrictive character.

1. No wrong without a remedy.

2. Equity regards the substance or spirit, and not the letter merely.

3. Equity acts “*in personam*.”

4. Equity follows the Law.

1. No wrong without a remedy. This is the chief root of our equity jurisdiction. You have already seen the over-luxuriance of the earlier shoots which sprang from it. The only limit, indeed, to its creative power, is the barrier interposed between itself and that portion of natural justice which, as already indicated, falls within the province of morals and religion only. To this maxim, for instance, we owe our vast system of uses and trusts. You are probably aware that, previously to the earliest records in the book before me (a) (the earliest are of the date of Richard the Second), a practice had grown up (under circumstances which time does not permit me to detail) of the legal owners of lands conveying them to third parties, who undertook to hold them for certain uses. The common law courts steadfastly refused to recognise in

(a) The Calendars of Proceedings, vol. i.

any way the engagements entered into by those (feoffees to uses, as they were called) to whom the land had been so conveyed (*a*). The chancellors, on the other hand, held that these engagements were binding on the consciences of the feoffees to uses, and that they (the feoffees) were compellable in equity to perform them. Thus was the foundation laid of the great system of trusts, which, by itself, constitutes the larger portion of the entirety of equity jurisdiction.

This was, perhaps, the boldest application of the maxim that the history of our equity jurisprudence

(*a*) This is well illustrated by the general immunity of trustees from criminal liability at common law in respect of breaches of trust, whether fraudulent or quasi-felonious. Until quite recently (1857) an ordinary trustee of (say) 30,000*l.* consols might sell the stock and misappropriate the proceeds without incurring criminal punishment. The previous legislation on the subject had been directed against particular persons, such as servants, bankers, factors, &c. The law on this point is humorously satirized by Fielding in his "*Amelia*," where Betty, having purloined her mistress's wardrobe, is brought before the Justice, and Booth, in charging her, says reproachfully, "Nay, you are not only guilty of felony, but of a felonious breach of trust, for you know everything you had was entrusted to your care."

The story then continues thus :—

Now it happened, by very great accident, that the Justice, before whom the girl was brought, understood the law. Turning, therefore, to Booth he said, "Do you say, sir, that this girl was entrusted with the shifts?"

"Yes, sir," said Booth, "she was entrusted with everything."

"And you will swear that the goods stolen," said the Justice, "are worth forty shillings?"

"No, indeed, sir," answered Booth; "nor that they are worth thirty either."

"Then, sir," cries the Justice, "the girl cannot be guilty of felony."

"How, sir," said Booth, "is it not a breach of trust? and is not breach of trust felony, and the worst felony, too?"

"No, sir," answered the Justice, "a breach of trust is no crime in our law, unless it be in a servant; and then the Act of Parliament requires the goods taken to be of the value of forty shillings."

tells of; and, as might be expected, it was one of early date. Let me read to you from the volume before me one of the earliest published instances of a resort to equity which falls under this head of jurisdiction (a).

2. Equity regards the spirit, and not the letter.

The popular belief, that the law exacts a literal fulfilment of contracts, has ever been deeply rooted. We trace it distinctly in the drama and in works of fiction. Perhaps one of the most remarkable instances is that of Shylock's bond. The penalty of the bond was, as you recollect,—

“A pound of flesh, to be by him cut off
Nearest the merchant's heart.”

The money not being paid on the very day, the Jew claims the penalty. Double the amount lent is offered; but, being tendered after the appointed time, it comes too late, and is refused.

And how is the intended victim rescued? By the merest verbal quibble. Portia says:—

“Tarry a little;—there is something else.—
This bond doth give thee here no jot of blood;
The words expressly are, *a pound of flesh*:
Take then thy bond, take thou thy pound of flesh;
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.”

Gentlemen, I should be sorry to profane Shakspeare, or to approach the creations of his genius in the same spirit that I should a report in Meeson and Welsby. Considerable latitude is to be allowed to the dramatist;

(a) The case of *Dodd v. Browing*, Appendix C, was then read.

but when I see Antonio saved by a species of construction, according to which, if a man contracted for leave to cut a slice of melon, he would be deprived of the benefit of his contract unless he had stipulated, in so many words, for the incidental spilling of the juice, one cannot help recognising in the fiction of the immortal poet an intensified representation of the popular faith, that the *law* regarded the *letter* and not the *spirit*.

As to the tender coming too late, that was in strict historical accordance with the law. At common law if a bond was once forfeited by non-payment of principal and interest on the day stipulated, the whole penalty must have been paid. In these cases of forfeited bonds, before the reigns of William III. and Anne, when the Legislature interfered to regulate the proceedings at common law (*a*), the only remedy for an obligor who had allowed the time for payment to elapse, was to file a bill in equity offering payment of principal and interest. It is clear that, had the scene of Shakespeare's play been laid in England, and not in Venice, the proper advice for Portia to have given, would have been, to file a bill in Chancery. But it must be admitted that the play would not have been improved.

The ground upon which the interference of the equity courts is now rested in these cases of forfeited bonds, is the maxim above referred to—that equity regards the spirit, not the letter; that in substance the bond was intended as a security merely; that the precise day of payment was immaterial.

(*a*) See 8 & 9 Will. III. cap. 11, s. 8; 4 & 5 Anne, cap. 16, ss. 12, 13.

To the same maxim also is to be referred the equity jurisdiction in allowing the redemption of mortgaged lands after the day stipulated by the contract. You are aware, doubtless, that in the ordinary form of mortgage the borrower conveys his property absolutely to the lender, subject to a stipulation that, upon payment of the money borrowed and interest, *on a particular day*, the property shall be reconveyed to the borrower. In the older form of mortgage, the stipulation commonly was, that upon payment on the day named, the deed should be void, or that the borrower should be at liberty to re-enter. The common law courts, construing these conditions with the utmost strictness, held that, unless the money were paid on the very day, the estate was lost to the mortgagor. The Court of Chancery, on the other hand, looking to the spirit of the transaction, held that the land was, in substance, a pledge merely, and that time was not of the essence of the bargain; and that, therefore, the mortgagor should be allowed to come after the time fixed and pay the principal and interest then due, and obtain back his estate.

While, however, we value to its full extent the maxim that the spirit and not the letter is to be regarded, it must be confessed that the heads of equity which are attributed to the application of this maxim are those which it is the least easy logically to justify. The ordinary money bond, for example, must, in its earliest use, have been meant to represent the true contract between the parties, and, if deliberately entered into, no valid ground for interference seems to exist.

In fact, to justify the equity jurisdiction, we must

suppose the existence of an epoch intermediate between the first use of the bonds and the exercise of the jurisdiction, and during which these money bonds (which originally truly represented the contract between the parties) came to be used merely as a convenient form of security; and I am not aware that legal history warrants such a supposition.

It is, indeed, extremely probable that a jurisdiction now justified upon the principle of the above maxim, derived its growth originally from the interposition of the court in cases where accident in allowing the day of payment to pass by, or some other circumstance of hardship, induced the equity judge to mitigate the literal rigour of the contract (*a*).

3. Equity acts "*in personam*." This is an important peculiarity. The remedy to which, in cases of breach of contract, the common law actions all tended was "pecuniary compensation." The aim of the equity courts was to make the defaulter *do* what was right. The thing to be done might or might not be the payment of a sum of money; but the *modus operandi* was to order the doing of it, and attach the defaulter's person until he did what was ordered. Hence arose the salutary equity jurisdiction in respect of wrongs which do not admit of pecuniary compensation. A man agreed to sell a field possessing special attractions for the purchaser, and subsequently refused to convey it. The Court of Equity decreed him to fulfil his contract—to perform it specifically, as we say—and justice was satisfied.

(*a*) See Spence's Equitable Jurisd. vol. i. p. 623—630.

Hence, again, proceeded the vast jurisdiction by injunction, assumed, and after many a struggle successfully maintained, by equity—a jurisdiction which practically conferred on the equity courts the power of modifying the effect of the decisions of other tribunals. Thus, a man, in assertion of his legal right, sued in the Common Law Court. His opponent came to the Court of Equity, and said, “Although the strict legal right is on the other side, there are equitable circumstances in this case which ought to deprive my assailant of the right of suing me.” And the Equity Court, if it agreed in this view, simply ordered the plaintiff at law not to sue, and put him in prison if he persisted.

Hence, again, the equity jurisdiction, even where the property in dispute was situate out of England, as in Ireland, Scotland, or the colonies. Hence, too, paradoxical as it may seem, the virtual trusteeship which the Court acquires over the very property of parties litigant; the Court saying to the executor, or other person bound to distribute the property,—“You ought to distribute according to the true equitable rights, and we *will order you to do so*. Meanwhile, until the rights are ascertained, you shall pay the money into the bank for safe keeping.”

4. To pass to the last maxim mentioned, “Equity follows the Law.” This, as intimated, is restrictive in its operation. It is the maxim chiefly referred to for the purpose of keeping the equity jurisdiction within moderate bounds. It may be said to have a double meaning and operation. Thus, first, “Equity follows

the law," in the sense of *obeying* it—conforming to its general rules and policy, whether contained in the common or in the statute law. Perhaps one of the best instances of the application of the maxim in this first sense is afforded by the decision of Lord Talbot, in the case of *Heard v. Stamford* (a). You are aware that, if a man marry a woman who is indebted, he thereby makes himself liable at law for all her debts. He may be sued immediately after marriage (b). But this liability of the husband for the debts of his wife contracted before marriage is one which ceases at the wife's death. In the case under consideration, a wife indebted before marriage brought a large fortune to her husband, and then died. It was contended that the husband, having

(a) Cases Temp. Talbot, 173.

(b) As to women married after August 9th, 1870, the law is altered by the Married Women's Property Act (33 & 34 Vict. c. 93), the 12th section of which enacts as follows:—"A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage; but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried."

This section agrees in principle with the decision, antecedent to the Act, of V. C. Malins (*Chubb v. Stretch*, L. R. 9 Eq. 555), that where the creditor's right of action for the wife's debt is destroyed by the husband's bankruptcy, property settled by the wife on her marriage to her separate use is liable. It may be doubted, however, whether the interests of creditors have received sufficient consideration by the framers of the Act; for the Act, while containing provisions making certain *after-acquired* property of a married woman her separate estate, leaves the rights of the husband in respect of the wife's property *at the time of marriage* untouched, so that it would seem that upon a husband marrying (without settlement) a wealthy but indebted wife, he might acquire her property, and the creditors would be without remedy during the coverture, just as they were, in *Heard v. Stamford*, held so to be after the wife's death.

received her fortune, was liable, in equity (though not at law), to pay her debts contracted before coverture. But the Lord Chancellor held otherwise, saying, "There are instances, indeed, in which a court of equity gives a remedy, where the law gives none; but where a particular remedy is given by the law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it farther than the law allows."

Again, "Equity follows the Law" in the sense of applying to equitable estates and interests the same rules by which at common law legal estates and interests of a similar kind are governed. Thus, equity having first, by the exercise of its creative power, called into existence the system of equitable estates, subsequently, acting upon the principle expressed by the above maxim, determined that these estates should partake, as nearly as possible, of the quality of the corresponding legal estates. Thus a use in fee descended according to the same rule, the husband was entitled to curtesy under the same circumstances, and so on, as in the case of the legal fee. There was an anomaly in respect of dower, which I do not now enter upon. You will find a most able exposition of the force of the maxim (in the sense which I am now alluding to) in the celebrated judgment of Sir Joseph Jekyll, in *Cowper v. Cowper* (a), in which case he decided (most reluctantly) that an equitable interest in fee, which

(a) 2 Peere Williams, 720. The particular passage extracted will be found at p. 752.

had vested in the infant son by the first marriage of Lord Chancellor Cowper, should descend to his cousin of the whole-blood, instead of to his brother of the half-blood, the Chancellor's infant son by a second marriage (a). The passage is quoted in many of the text-books ; but I cannot forbear reading it :—

“ The law is clear, and courts of equity ought to follow
 “ it in their judgments concerning titles to equitable
 “ estates ; otherwise great uncertainty and confusion
 “ would ensue ; and though proceedings in equity are
 “ said to be *secundum discretionem boni viri* (b), yet
 “ when it is asked, *vir bonus est quis ?* the answer is,
 “ *qui consulta patrum qui leges juraque servat ;* and
 “ as it is said in *Rooke's case*, 5 Rep. 99 b., that dis-
 “ cretion is a science not to act arbitrarily according
 “ to men's wills and private affections, so the discretion
 “ which is executed here, is to be governed by the
 “ rules of law and equity, which are not to oppose, but
 “ each, in its turn, to be subservient to the other ; this
 “ discretion, in some cases, follows the law implicitly ;
 “ in others, assists it, and advances the remedy ; in
 “ others again, it relieves against the abuse, or allays
 “ the rigour of it ; but in no case does it contradict
 “ or overturn the grounds or principles thereof, as has
 “ been sometimes ignorantly imputed to this court.
 “ That is a discretionary power, which neither this
 “ nor any other court, not even the highest, acting in

(a) For the modern alteration in the law respecting descent to the half-blood, see 3 & 4 W. IV. cap. 106, s. 9.

(b) See Bacon, “*De Augmentis*,” lib. viii. aph. 32, where, speaking of the *curiæ prætoriæ*, he says, “*Quæ statuunt ex arbitrio boni viri.*”

“a judicial capacity, is by the constitution entrusted
“with.”

Having now pointed out to you what I consider to have been the origin of our equity jurisprudence—having shown, as I conceive, the impossibility of defining adequately its nature and extent by any general statement and description, or indeed in any other way than by a catalogue of the various heads of equity—having attempted nevertheless to convey some kind of imperfect notion of its nature and extent—it remains that I should say a few words respecting the classification of the various heads of equity jurisdiction.

And here it is to be observed, at the outset, that these various heads of equity jurisdiction being merely the fruits of the shortcomings of the courts of common law, it might be expected that what is not a system in itself (though one is in the habit of so calling it), but only a supplement to the imperfections of another system, should hardly allow of a very methodical classification—and such is the fact. We can classify the heads of equity jurisdiction only by reference in some way to the defects of the common law jurisdiction which it supplements. In the “Manual of Equity Jurisprudence” of Mr. Josiah Smith, the different heads of equity are grouped according to the nature of the relief afforded, or of the functions performed by the court. The titles in Mr. Smith’s book are “Remedial Equity,” “Executive Equity,” “Adjustive Equity,” “Protective Equity,” and “Auxiliary Equity.” This arrangement of the subject is, however, so purely scientific, that I prefer adopting the more usual division into

Exclusive, Concurrent, and Auxiliary; i.e. under the first title are to be ranged all those heads in respect of which the courts of equity have exclusive jurisdiction; under the second, those in which their jurisdiction is concurrent with that of the common law courts; under the third, those in which courts of equity, acting in aid merely of the common law courts, supply some additional remedy which the latter are inadequate to afford. This arrangement, though incomplete in some respects, possesses the great advantage of an immediate tangible connection with the history of the subject itself. Does the case fall within the first class?—then it was one of those in which the common law afforded no relief. Within the second?—then the relief in equity was probably more perfect, more convenient. Within the third?—then the partial help of equity, supplying some want of the common law, but not otherwise assuming jurisdiction, was needed and granted. But this arrangement has another and far greater advantage. It is of practical utility. For in practice the important question (in many cases, at least) is not as to the character of the relief afforded by the court, viz., whether it be remedial, adjustive, or protective, but whether there is a remedy in equity or not; and if there be one, whether the suitor has a choice of proceeding at law or in equity; and the ordinary classification tends to call the attention forcibly to these main points. For my own part, without wishing to underrate the importance of a scientific analysis of the heads of equity, in reference to the character of relief afforded, I would strongly advise you to adopt

the usual arrangement in the acquisition of equity knowledge.

Before parting with this subject, let me allude to a classification, not of heads of equity jurisprudence, but of the general business of the Court of Chancery which it is of extreme importance that you should, as men of business, appreciate thoroughly. The popular notion of the Court of Chancery is, that it is purely concerned with litigation. Nothing can be farther from the fact. A large, perhaps the larger, portion of the business of the Court is purely administrative, the residue only litigious. Thus, an intestate dies, a bill is filed, his property is realised, his creditors are paid, and the residue is distributed under the direction of the Court. In such a case, in the absence of any dispute respecting the next of kin or heir at law, the Court merely performs the functions of a trustee. So, when a testator dies, the suit for the administration of his estate is frequently litigious to some very trifling extent only.

It is much to be regretted, that, amidst the general outcry and obloquy to which the Court of Chancery has been exposed, this distinction should have been so frequently overlooked, and in some cases, I fear, wilfully put out of sight.

Chancery suits for the administration of property bequeathed by a testator to some half-dozen children for their lives, and after their respective deaths to their children at twenty-one, have been represented as owing their vitality, not to the happy health of the tenants for life, whose property has been well

taken care of, but to the careless indolence or perverse ingenuity of judge, counsel, solicitors, and officers of the Court.

When some educated people are found imbibing from the works of fiction of a well-known talented author the notion that Chancery martyrs still exist, and that Chancery is not a mere ordinary Circumlocution Office (to adopt the author's phrase), but circumlocution of malice prepense, it is well that you, gentlemen, should at least be able, in case of need, to point out the broad distinction between the litigious and administrative business of the Court, and to refer to its true causes the longevity of a large proportion of our Chancery suits.

I must now conclude. This, my first lecture, has, I confess, fallen short of what I had hoped to accomplish when I drew up my prospectus. I had thought then to have embodied in it a connected historical sketch of the different heads of equity. It, however, soon became evident to me that to do this well would have required far more time than I could command. I regret it extremely. The importance of studying the jurisprudence of equity historically, has, I think, hardly been appreciated. I spoke at the outset of the advantage of varying your modes of learning; let me recommend, as a mode of acquiring a knowledge of equity, one which I believe you will find both interesting and profitable. Take Lord Campbell's "Lives of the Chancellors." Begin (say) with the life of Lord Nottingham. Read first the life of a chancellor, and then turn to the reports of his more important decisions. Lord

Campbell's biographies will give you some information respecting the legal performances of each chancellor and the books in which they are to be found recorded ; and I am much mistaken if you do not find this combination of history, biography, and equity impart a new zest to your studies.

LECTURE II.

THE subject of my present lecture is the general history and constitution of the courts by which equity jurisprudence is administered.

At the outset, let me observe that I do not propose treating of courts of equity no longer in existence, such as that of the Equity Exchequer, abolished some fifteen years since (*a*): nor of courts which, practically if not theoretically, exercise only a limited jurisdiction, such as the Chancery Court of the County Palatine of Lancaster (*b*).

With the exception of a few observations respecting the equity appellate jurisdiction of the House of Lords, I shall confine my consideration exclusively to those branches of the High Court of Chancery, whose local habitation may be said to lie within a few yards of the spot where we now stand (*c*).

The staff of high dignitaries administering equity justice consists, of the Lord Chancellor, two Lords

(*a*) As from Oct. 15, 1841. See 5 Vict. cap. 5.

(*b*) The practice of the Lancaster Chancery Court is regulated by the 13 & 14 Vict. cap. 43, and 17 & 18 Vict. cap. 82, and in common with the High Court of Chancery by the 21 & 22 Vict. cap. 27, and the 25 & 26 Vict. cap. 42.

(*c*) The lectures were delivered in the buildings of the Incorporated Law Society, at Chancery Lane.

Justices, the Master of the Rolls, and the three Vice-Chancellors, seven in all. I place the Lords Justices before the Master of the Rolls, as occupying in judicial importance a higher position; though I may observe, by the way, that, as respects legal precedence, the Master of the Rolls ranks before the Chief Justice of the Common Pleas and Chief Baron of the Exchequer, both of whom precede in order of legal dignity the Lords Justices of the Court of Chancery. Of these seven judicial dignitaries, five fill offices which are of comparatively recent creation; and it will, I think, be more convenient to state shortly the origin of the more modern amongst them, before proceeding to the consideration of the ancient.

Let us, then, direct our attention to the Lords Justices first, as being the most recently created high equity functionaries. Their dignity is indeed of the most modern date. I need only carry you to the year 1850. In the summer of that year, Lord Cottenham had resigned the Great Seal from illness. His successor, Lord Truro, a common lawyer, was but imperfectly acquainted with the practice of the Court; and this, combined with an almost over-painstaking disposition, led to an extreme slowness in disposing of the appeals before him. In fact, the Appellate Court required strengthening. The result was, the Act of the 14th and 15th Vict., cap. 83 (a). * * * *

(a) The following sections were read or referred to :—

§ 1. Power to appoint two judges of the Court of Appeal.

§ 5. Court of Appeal to have all the jurisdiction at time of Act exercised by the Lord Chancellor.

The 12th section of the Act seems to contemplate the making of some general regulations by the Chancellor with respect to the sittings and business of the Court of Appeal. No general regulations have, however, been issued. The practice as to sitting may be thus stated. Whenever the state of the appellate business and the Lord Chancellor's other avocations so permit, or whenever a case of unusual importance occurs (such as that relating to the rights of the preference shareholders of the Great Northern Railway (*a*), which is to be proceeded with to-morrow before the full court), the three judges sit together. In the absence of the Lord Chancellor, the Lords Justices sit alone. When the state of the appellate business makes a severance desirable, the Lord Chancellor and Lords Justices sit as separate courts. This is more frequently the case than not, and in fact is so at the present time. To-morrow, after the Great Northern Railway case shall have been disposed of by the full Court, the Lord Chancellor and Lords Justices will sit separately (*b*).

§ 9. Decision of the majority to be the decision of the Court, and if the judges equally divided, order under appeal to be deemed affirmed.

§ 11. One judge with Lord Chancellor, or two judges together, or Lord Chancellor alone, to form court.

By the joint effect of the 30 & 31 Vict. cap. 64, and 31 Vict. cap. 11, a single judge may now exercise all the jurisdiction of the Court of Appeal except that decrees made at the hearing of a cause or on motion for decree or on further consideration cannot be reheard by a judge sitting separately.

(*a*) *Henry v. Great Northern Railway Company*, now reported 1 De Gex & Jones, 606.

(*b*) The practice as to sitting has varied considerably, according to the views and inclination of the holder of the Great Seal for the time being. During the greater part, if not the whole, of Lord Westbury's Chancellorship, there were no sittings of the full court.

That this Act has, on the whole, proved a benefit to the suitors cannot, I think, be doubted. That it is not altogether satisfactory in its actual working, is, in my judgment, equally clear. The uncertainty, whether if an appeal be presented, it will be heard by the three judges, or by the two justices, or by the Lord Chancellor alone, creates often serious difficulty in determining whether an appeal should be presented or not. Occasionally, when little doubt is felt that a decision below could not stand if reviewed in presence of three judges, the reconsideration of it by a single mind affords a comparatively slender hope of success.

Six years of retrospect (*a*), then, gentlemen, are sufficient to bring us to a time when the Lords Justices formed no part of the staff of equity judges. There would remain, however, as representing the judicial corps, the Lord Chancellor, the Master of the Rolls, and three Vice-Chancellors; the first acting as appellate judge in respect of the judgments of the four last. Travel back with me to the year 1841, and you will have reached the modern cradle of the two last created vice-chancellorships (*b*). Go back again some thirty years more, to the year 1813, and you will arrive at the origin of our first vice-chancellorship (*c*).

The appointment of a Vice-Chancellor, in 1813, was a remedy tardily applied to mitigate the evils caused partly by the arrears of business of the Court of Chancery, but more particularly by the arrears in the appeals to the House of Lords. Lord Castlereagh, in

(*a*) *i.e.* from 1857. (*b*) 5th Vict. cap. 5. (*c*) 53d Geo. III. cap. 24.

moving in the House of Commons the second reading of the bill for the establishment of the vice-chancellorship, stated, that the arrear of appeals then pending before the House of Lords amounted in number to 280; and that, according to the average rate at which the causes had been decided, they could not be determined in less than eleven years (*a*). It was desired, therefore, to appoint a Vice-Chancellor, in order that the Chancellor might devote more time to the House of Lords' appeals; and this was done.

The two new vice-chancellorships of 1841 were part of a general scheme for the abolition of the Equity Exchequer jurisdiction. Previously to that time, bills used to be filed in the Exchequer Court, and equity causes determined there, under a system of pleading and practice differing very little from that of the Court of Chancery. A single judge of the Exchequer sate in equity. The jurisdiction was practically subject to two evils—First, the equity judge had to go circuit early in July, and the Court was, therefore, closed from July to November; and secondly, the only appeal, even from interlocutory orders, was to the House of Lords.

For these reasons it was thought expedient to abolish the Equity Exchequer jurisdiction, and at the same time two new vice-chancellors were created.

Such is the general outline of the origin of the three vice-chancellorships; but there is some little complication in the Acts under which the three present vice-chancellors sit.

(*a*) Hansard's Parliamentary Debates, vol. xxiv. p. 459.

The Act of 1813, the 53d George III. cap. 24, created a new judge with the title of Vice-Chancellor of England, and a salary of 6,000*l.* per annum, ranking immediately after the Master of the Rolls. The Act of 1841 created two new vice-chancellors with salaries only of 5,000*l.*, and ranking only after the Chief Baron of the Exchequer; and the same Act made provisions for placing the then future successors of the then Vice-Chancellor of England on the same footing, as regards salary and precedence, as the two new judges.

It was, however, supposed, at the time of the Act of 1841, that the services of one only of the two new vice-chancellors would be required permanently; and the Act, therefore, provided that no successor should be appointed to the vice-chancellor secondly appointed under that Act. As it happened, the first vacancy in the vice-chancellorship of 1841 was that caused by the lamented infirmity of Vice-Chancellor Wigram, who was in fact the secondly appointed vice-chancellor; and on his resignation, therefore, no new judge could be appointed, although the state of business called for the services of one. A special Act became therefore necessary to provide for the continuance of the vice-chancellorship. This Act, again (14th and 15th Vict. cap. 4), only provided for the appointment of a single successor to Vice-Chancellor Wigram; and the third vice-chancellorship (*i.e.* the second under the Act of 1841) was made permanent only in the year 1852, as part of the general scheme for the abolition of the Master's offices (*a*). We have now, as you perceive,

(*a*) 15 & 16 Vict. cap. 80, s. 52.

after travelling backwards less than sixty years, eliminated five of the seven high equity functionaries.

The Lord Chancellor and the Master of the Rolls alone remain. Their dignity and office cannot be so summarily disposed of; and at this point perhaps it may be convenient to trace the origin and growth of their jurisdiction as equity judges.

Such of you as may have found time since my last lecture to refer to the chapters of Mr. Spence's work, or of Sir W. Blackstone's commentaries, then recommended for your perusal (a), will have learnt that, under the Saxon monarchs, and immediately after the Norman Conquest, the whole business of the country, political, administrative, and judicial, was concentrated in the great or general council. Such a mode of government was obviously consistent only with an extremely rude state of society. With an advancing civilization, a division of labour was inevitable.

The first step in this direction was that by which a minor or executive council was formed out of the great or general council. The history of the creation of the minor or executive council may be thus stated:—The general council met only at fixed times; I think three times a year only. A permanent council, which should be at hand to advise the Crown when the great council was not sitting, was therefore needed. Now, amongst the component elements of the great council as continued under the Norman Conquest, were most

(a) Spence's Eq. Jurisd. vol. i. Part II. Book I. chapters ii. and v.; Bl. Com. vol. iii. ch. iv. Hints for preparation for the next lecture were occasionally given at the end of the preceding one.

of the high officers of the realm; such as the Lord Chancellor, the Lord High Steward, &c. These high officers were, in fact, *ex-officio* members of the great council; just as by many, if not most, of the modern constitutions of foreign countries of the present day, the Crown ministers sit and vote, as of right, in the legislative assemblies which are otherwise elective. The permanent council which was needed was created by forming into a smaller council the high officials whom I have just referred to, and joining with them the greater barons. By this means the executive and judicial functions were severed from the great council, leaving the legislative, so far as in those early times the great council can be said to have had any legislative functions, with the latter.

The next step was the severance of the judicial functions from the executive. The minor council was attendant on and followed the monarch's person; and one of the grievances complained of in the time of King John was, that the necessity of travelling whithersoever the Crown might be resident to obtain the decision of causes, led to expense and trouble. Accordingly, we find a special article in Magna Charta:—"Ut communia placita non sequantur curiam domini regis sed assignentur in aliquo certo loco;" and by virtue of this article the Court of Common Pleas was established at Westminster. The Courts of Queen's Bench and Exchequer, and indeed the Court of Chancery itself, were similarly offshoots from the *aula regis*, or lesser council, which ultimately retained little more than the functions of the privy council.

The foregoing may be accepted as a general outline of the history of the severance and distribution of the legislative, administrative, and judicial functions of the monarch and his great council. But, as might be supposed, the severance was only gradually effected. Thus it appears, that, so late as the reign of Edward I., the practice of presenting petitions to the king in Parliament, concerning matters which ought to have been dealt with by some one of the severed branches of jurisdiction, prevailed to an extent sufficient to interfere with the ordinary business of the great council of Parliament. This is made clear by an ordinance of the eighth year of that monarch, which runs in substance thus :—

“ Because the people coming to the king’s parliament are often delayed and disturbed by the number of petitions brought before the king, the greater number of which could be disposed of by the chancellor and the justices, it is provided, that all petitions touching the *Seal* do come first before the chancellor, and those touching the *Exchequer*, &c., do come, &c., and those touching, &c. &c. &c. And if the demands be so great, *and so much of grace*, that the chancellor and these others cannot do without the king, then they shall bring them before the king with their own hands to know his will (a).”

In the reign of Richard II., the proper limits of the jurisdiction of Parliament would appear to have become somewhat better understood, at least by Par-

(a) See the ordinance, as copied from Ryley’s Pleadings in Parliament, 442, given in Appendix D.

liament itself. Thus, in the thirteenth Richard II. we find a petition amounting in substance to a bill for the redemption of a mortgage, and the answer is : “ Que la dite petition n'estoit pas petition du Parlement, einz que la matire en ycelle compris deust estre discus par la Comune Ley (a).” And in the fifteenth year of the same reign, on a petition by the Abbot and Convent of Abingdon, complaining of an improper seizure by the king's escheator, the answer is, in substance, “ Let the matter be referred into Chancery (b).”

Not that the Parliament Rolls of later date do not contain instances of occasional departure from true principle. Thus, in the fifth year of Henry V. we find William De Clynton presenting a petition, complaining that he had enfeoffed William de la Pole and others of all his land in England and Calais, and that William de la Pole, sole survivor, refused to deal with the lands according to his direction. And we find relief actually given by the Parliament, and De la Pole ordered to enfeoff new persons named by De Clynton, and the feoffment itself recorded on the Parliament Rolls (c).

But it is time that we should attempt to trace more particularly the causes which led to the jurisdiction in equity becoming vested in the Lord Chancellor, rather than in any other portion of the judicial system.

In my first lecture, though explaining generally the causes and origin of equity jurisprudence itself, I rather

(a) Rotuli Parl. vol. iii. pp. 258, 259. (b) Ibid. p. 297.

(c) Rotuli Parl. vol. iv. p. 151.

took for granted than explained the fact of the *Chancellor* becoming the judge by whom Equity should be administered.

One mode in which the acquisition by the Chancellor of the equity jurisdiction has been accounted for, is that suggested by Lord Hardwicke, when Mr. Yorke, in his celebrated argument in *Rex v. Hare & Man* (a). The argument arose out of a question, whether a writ of *scire facias*, directing the defendant to appear “coram nobis in cancellariâ nostrâ, &c. &c. “*ubicumque tunc fuerit*,” were good, or whether the words “in Angliâ” ought to have been added. In this case Lord Hardwicke, entering learnedly into the origin of the jurisdiction of the Court of Chancery, says as follows:—

“The jurisdiction of this court, as it is a court of equity, is perhaps of all others the most difficult to be traced, both as to its foundation and the time when it had its original. But I think there have been very great opinions, and I am apt to believe a strict search into antiquity might enable one to show, that this jurisdiction also has taken its rise from the Great Seal. For the Chancery being, upon the division of the king’s courts, naturally the *officina justitiæ* from which all original writs issued, and where the subject was to come for remedy in all cases, the chancellor was applied to in all cases for proper writs, where the subject wanted a remedy for his right, or redress for a wrong that had been done him. But in the execution of this authority, he was

(a) 1 Strange, 150.

“ confined by the rules of the common law, and could
“ award no writs but such as the common law war-
“ ranted : therefore, when such a case came before
“ him, as was matter of trust, fraud, or accident
“ (which are the subjects of an equity jurisdiction),
“ the chancellor could award no writ proper for the
“ plaintiff’s case, because the common law afforded no
“ remedy. Upon this it is not improbable that the
“ chancellors, who were most commonly churchmen,
“ men of conscience, when they found those cases
“ grew numerous, in order to prevent the suitors from
“ being ruined against right and conscience, and that
“ no man might go away from the king’s court without
“ some relief, summoned the parties before them, and
“ partly by their authority, and partly by their admo-
“ nitions, laid it upon the conscience of the wrong-doer
“ to do right.”

Lord Hardwicke’s suggestion is ingenious, and it has received the countenance of no less a person than Sir James Mackintosh (*a*) ; but, to the best of my judgment, it is not supported by the known facts. In the first place, the officers specially entrusted with the framing of the writs which issued out of Chancery, were the clerks or masters in Chancery, who are specially mentioned in the Act of Edward I. (*b*) ; and there is no ground for assuming that the chancellor exercised any personal supervision in the matter. In the next place, a hypothesis, which assigns to the chancellor the part of taking the

(*a*) Life of Sir Thomas More, Misc. Works, vol. i. 453.

(*b*) See p. 11, *supra*.

initiative, is quite inconsistent with the forms of the old petitions.

If one might venture to offer another hypothesis, connecting the chancellor's equitable jurisdiction with his position as head of the great "*officina justitiæ*," it would be that the clerks in Chancery, upon being applied to for writs, informed the suitors that they knew of none applicable, and suggested a petition to the chancellor for redress. This, however, is conjecture merely.

But even assuming that the equity jurisdiction acquired by the chancellor was partly due to his position as chief officer of the court from which all writs issued, his acquisition of jurisdiction as an equity judge seems mainly traceable to facts which are historically upon record.

The chancellor was, as you know, the confidential adviser of the monarch in all important matters (the keeper of the king's conscience, he was called), and pre-eminently the fittest person to take into consideration petitions of the subject praying for the special exercise of the monarch's grace. Petitions of this class were (as appears from the ordinance of Edward I., which I read to you) frequently addressed to the king in parliament, and were, according to the words of the ordinance, *to be brought before the king himself*. Other petitions of a similar kind were, doubtless, presented to the king in council, or to the monarch himself (*a*). These matters

(*a*) There is an instance at p. xvi. of the collection of early bills prefixed to the first volume of the Calendars in Chancery, of a petition to the monarch himself. It is of so late a date as Henry V., and appears to have been referred by him to the Chancellor.

of grace were, during the reigns of the first two Edwards, frequently, though not invariably, referred to the chancellor. The first distinct recognition of the chancellor as the proper person to deal with matters of this class, is in the 22d year of Edward III. In that year we find a writ addressed to the sheriffs of London by the king in something like the following words :—

“ Being daily occupied in various matters concerning
 “ ourselves and the estate of our kingdom of England,
 “ we will that those having in future matters to pro-
 “ secute before us, concerning either the common law
 “ or our special grace, do prosecute the same affairs as
 “ follows; that is to say, matters relating to the common
 “ law before the Venerable Elect of Canterbury, our
 “ Chancellor, to be despatched by himself, and other
 “ matters to be granted as of grace, before the same
 “ Chancellor, or our beloved Clerk Keeper of the Privy
 “ Seal, &c. (a).”

The matters *relating to the common law* here mentioned are those heads of common law jurisdiction belonging to the chancellor, which formerly were of considerable importance, and which are detailed in the chapter of Blackstone recommended for your perusal at the end of my first lecture (b). The matters of *grace*

(a) Translated at 1 Story Equity Jurisprudence, § 44, note ; and also in “Legal Judicature in Chancery Stated,” where also the original is given in Latin. But the more accurate version of the writ is doubtless that at p. xxviii. of the Introduction to the Rot. Lit. Claus., published by the Record Commission.

(b) Bl. Com. vol. iii. 48. See 12 & 13 Vict. cap. 109, regulating the practice of the common law side of the Court of Chancery.

are obviously those specially calling for equitable interference of the Crown.

We cannot, then, be surprised that, after the chancellor had been thus distinctly pointed out by the Crown as the proper person to deal with these matters of grace, the practice should have grown up amongst the suitors of applying to the chancellor directly by petition, instead of indirectly through the king in council. Accordingly, as appears from the collection of bills or petitions to which I referred in my last lecture (*a*), petitions directed to the chancellor himself were in common use in the reign of Richard II.

Indeed, whatever difficulty there may be in tracing the precise steps of the process by which the chancellor acquired his equity jurisdiction, nothing is clearer than that it was firmly established in the reign of Richard II. This is proved, not only by the precedents of petitions before referred to, but by the terms of the statute of the seventeenth year of that monarch's reign, which runs thus :—"Item, Forasmuch as people be compelled "to come before the king's council, or in Chancery, by "writs grounded upon untrue suggestions, that the "chancellor for the time being, presently after such "suggestions be duly found and proved untrue, shall "have power to ordain and award damages, according "to his discretion, to him which is troubled unduly, as "afore is said (*b*)."

It is from this statute that the equity courts, even at this day, derive their power of awarding costs.

We have now traced the establishment of the Chan-

(*a*) See p. 15, *supra*.

(*b*) 17 Ric. II. cap. vi.

cellor's equitable jurisdiction ; but there still remains one of the seven judges to whom I introduced you in the outset, whose judicial functions have not yet been noticed.

You recollect that, in my first lecture, I spoke of the Clerks in Chancery, whose business it was to frame the original writs in common law actions. The Master of the Rolls was the chief of these clerks. He was also a dignitary of considerable importance, a conservator of the peace, and had various important duties committed to him, in connexion with the custody of the records. Whether he had originally an independent jurisdiction in equity cases, is a point upon which those most competent to express an opinion have differed very widely.

To the best of my judgment, he had not ; and the following appears to me to be a correct representation of the gradual acquisition of his present judicial power.

In discussing hitherto the Chancellor's equitable jurisdiction, we have spoken of the Chancellor as if he were the sole judge in equity. And so he was in his own court, technically. Practically, however, the Chancellor never sate in early times without calling to his assistance either the Master of the Rolls or some others of the Clerks in Chancery, commonly some of those amongst them who, as the practice of appointing ecclesiastics fell into desuetude, happened to be doctors in civil law. When thus summoned, the Master of the Rolls and the other masters sate really as assessors to the chancellor. They had no voice in the judgment,

but assisted him with their advice. That the system was in full vogue in Bacon's time, is clear from the thirty-eighth aphorism in his treatise "*De Augmentis*," in which, speaking of the *Curia Prætoria* (Chancery Courts), he expresses his opinion that the jurisdiction ought not to be confined to a single judge. He says, "*At curiæ illæ uni viro ne committantur, sed ex pluribus constant*" (a). I believe I am correct in stating that, so late even as the chancellorship of Lord Brougham, it was usual for two of the Masters in Chancery to follow the Chancellor into court on the first day of term, and take their seats, or prepare to take their seats, on the bench by him; whereupon the Chancellor, ceremoniously bowing, dismissed them from further attendance. Lord Brougham first discontinued the ceremony.

The earliest judicial attendances of the Master of the Rolls would seem, then, to have been merely as assessor, just as in the case of the other Masters. It was also usual for the Chancellor to refer causes to the Master of the Rolls, and to the other Masters, to determine particular points, or to investigate particular questions. Even demurrers used before Lord Bacon's time to be referred to the Master of the Rolls and to the other Masters. In Queen Elizabeth's reign a practice was introduced of issuing commissions authorising the Master of the Rolls and others, commonly certain of the Masters in Chancery, to hear causes during the absence of the Chancellor. And under the authority of similar commissions, the Masters of

(a) *De Augmentis*, lib. viii. aph. 38.

the Rolls continued to sit as judges until the reign of George II.

The judicial authority of the Master of the Rolls was, however, limited by some special exceptions, which seem conclusively to negative the notion of its having an original independent existence. Thus, Lord Bacon had, upon taking his seat as Lord Keeper, announced his intention not to refer demurrers or pleas to the Master of the Rolls; and it is an admitted fact that the Master of the Rolls never heard demurrers or pleas. A similar exception existed as to motions, which the Master of the Rolls never heard.

On the other hand, it must be owned that some slight indicia of an independent judicial authority are to be found. For instance, bills appear to have been occasionally addressed to the Master of the Rolls at an early date. Thus, in the selection of petitions already referred to, there is an instance (the precise date is not known, but it is supposed to be of the reign of Henry VI.) which runs thus—"To my full honourable
"and right worshipfull Maister, my Mayster the Clerke
"of the Rolls" (a). But however this may be, it is certain that, during the period which elapsed from the first establishment of the equity jurisdiction to the reign of George II., the Master of the Rolls gradually departed more widely from the position of a Master in Chancery, and assumed more and more that of an independent judge.

In the early part of George the Second's reign, a vigorous controversy arose respecting the judicial *status*

(a) Calendars of Proceedings in Chancery, vol. i. p. lix.

of the Master of the Rolls. The more immediate cause of this controversy was a somewhat unseemly collision between Sir Joseph Jekyll, the then Master of the Rolls, and Lord King, then Lord Chancellor, Sir Joseph having ordered the registrars of the court to draw up his decrees without requiring the names of two other Masters to be added in the margin, and the Lord Chancellor having directed the registrars to stop all decrees of the Master of the Rolls which were wanting in the usual addition of two Masters' names. It was contended on the one hand that the Master of the Rolls was entitled to exercise, and had, ever since the existence of the Court of Chancery, exercised the functions of an independent judge; and on the other, that the Master of the Rolls had no other judicial authority save that derived by him either from and through the Lord Chancellor, or through the commissions before referred to. The first view was supported by Lord Hardwicke, then Sir Philip Yorke, Attorney-General (who was connected by marriage with Sir Joseph Jekyll, the then Master of the Rolls), in an anonymous treatise, entitled "A Discourse on the Judicial Authority of the Master of the Rolls;" the latter view was maintained in the treatise known as "The Legal Judicature in Chancery Stated," which is said to have been written by Mr. Burrough, one of the Masters in Chancery, with the assistance of the afterwards celebrated Bishop Warburton, then a young man (*a*). The question, so hotly discussed,

(*a*) See biography of Warburton, prefixed to the edition of his works by Hurd, vol. i. pp. 8, 9.

was shortly afterwards set at rest by legislative interference; but the controversy of the day bore rich lasting fruit, and the treatises themselves still rank amongst the most valuable storehouses of antiquarian information respecting the Court of Chancery.

The legislative interposition alluded to was effected by the 3rd George II. cap. 30, which enacted as follows: "That all orders and decrees made by the present Master of the Rolls or any of his predecessors, or hereafter to be made by the present Master of the Rolls or any of his successors, *except orders and decrees of such nature and kind as, according to the course of the said court, ought only to be made by the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal*, shall be deemed and taken to be valid orders and decrees of the said Court of Chancery, subject nevertheless to be discharged, reversed, or altered by the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the time being, and so as no such orders or decrees be enrolled till the same are signed by the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal."

The words of the Act at once suggest a doubt whether it was well adapted to ascertain definitively the limits of the judicial authority of the Master of the Rolls; since, by the exception introduced, it still left open the question *what kind of decrees* ought to be made by the Chancellor only?

Practically, however, I believe no doubt or question

ever arose as to its construction. The Master of the Rolls continued to act as an independent inferior judge, capable of hearing a cause and making a final decree therein, subject only to appeal to the Chancellor, but unable to hear either demurrers, pleas, or motions, and sitting, if not as a matter of necessity, yet, in fact, in the absence only of the Chancellor. I have been told that, in the latter part of Lord Eldon's time, the Chancellor and Master of the Rolls used to arrange their sittings something after the following fashion. The Master of the Rolls sate from nine to ten, commonly in plain clothes, to dispose of minor matters. At ten the Chancellor took his seat at Lincoln's Inn, and then the Rolls Court rose. The Chancellor sate till four, and the Master of the Rolls again at six in the evening. Of course these combined sittings did not occur daily. Neither the Lord Chancellor nor the Master of the Rolls sate every day. But finally, you will learn with some surprise, that although the Vice-Chancellor of England, a judge of inferior dignity, had, from the first creation of his office, the power of disposing of every species of business of the court, it was not until the year 1833 (*a*) that the Master of the Rolls was placed on the same independent footing, and empowered to dispose of pleas and demurrers, and hear motions.

And now, gentlemen, having, to the best of my ability, introduced you to the high judicial functionaries of the court, it remains that I should, somewhat briefly, allude to other functionaries of lower rank,

(*a*) 3 & 4 Will. IV. cap. 94, s. 24.

some mention of whom is necessary in order to convey an accurate conception of the constitution of the court.

These are the Masters, the Accountant-General and his staff, the Registrars, the Examiners, and, under the system lately introduced, the Chief Clerks.

The first of these classes, the Masters, has nearly expired. A few members of the body still linger in the neighbourhood of Southampton Buildings, but the office and dignity will shortly become matter of history (*a*).

The Accountant-General and his staff form one of the most important elements of the court as actually constituted. You remember that, in my last lecture, I directed your attention to the broad practical distinction between the litigious and the administrative business of the court, and commented on the vast importance of the latter. Well, the Accountant-General's office may be esteemed the heart and life of the administrative functions of the court. It is, in fact, the machinery by which the court receives into its keeping and distributes again, at the fitting time, the vast sums which are subject to the trusts of wills and deeds, the provisions of which are carried out under the direction of the court. The best mode, perhaps, of conveying to your minds a fitting notion of the magnitude of the operations of this department of the court, will be to tell you that the total value of suitors' property in the custody of the Court of Chancery, amounts to about

(*a*) The last acting Masters were finally released from their duties in August, 1860.

£50,000,000 (a). The Accountant-General's office is a thing of recent date. Previously to the year 1726, the custody of the suitors' money was entrusted partly to the usher of the court, but chiefly to the different Masters to whom the different causes were referred. The Usher and Masters were considered, in reference to these moneys, as standing in the position not of trustees, but merely of bankers or debtors (b). The Masters commonly purchased their offices of the Lord Chancellor, and indemnified themselves by turning the suitors' money to profitable account. Such a state of things could not but terminate in shame and scandal. Accordingly, in the year 1725, it was dis-

(a) The exact amount of stock and securities in Court on the 1st October, 1853 (exclusive of stock bought with suitors' cash), was 44,340,348*l.* 0*s.* 8*d.* The amount of suitors' cash (including cash invested in stock for the better security of the suitors) was 3,239,226*l.* 18*s.* 5*d.* (see Return to Order of House of Commons, Parliamentary Paper 73, for 1855), which, after allowing a yearly increase of about one million (as to which see Judicial Statistics, 1863, England and Wales, Part II. xxiii.), would make the amount at the date of the Lecture (1857) between fifty-one and fifty-two millions. On the 1st of October, 1870, this amount had increased to nearly sixty-one millions (Judicial Statistics, 1871, England and Wales, Part II. xxxii.).

These figures represent merely the securities specifically belonging to, and cash owing to the suitors, and exclude the funds arising from accumulations made by the Court by purchasing stock with the suitors' cash not required by them to be invested, and investing and accumulating the dividends on such stock. These accumulations amounted altogether to upwards of two millions stock, of which one million was taken from the Court by the Government in 1865, and appropriated towards defraying the expense of new Courts of Justice, and the remainder in 1869. (See 32 & 33 Vict. cap. 91.).

The fullest and most accurate information respecting the working of the Accountant General's Office is to be found in the report of the Chancery Funds Commission of 1864, and the Appendix thereto.

(b) See *Trevor v. Blucke*, 6 De Gex, Macn. & Gor. 170.

covered that some four or five Masters had, like the mass of the community, been afflicted with the South Sea mania, that they had speculated with the suitors' money, and were defaulters to a large extent. The discovery at once directed public indignation towards the then Chancellor, Lord Macclesfield, who had driven a more regular traffic than his predecessors in the sale of the Masters' offices. He was impeached, and sentenced to pay a fine of £30,000. By a kind of rude equity, Lord Macclesfield's fine was applied towards making good the deficiency in the Masters' accounts; and in order to guard against similar defaults in future, the Accountant-General's office was created.

The new system devised for the protection of the suitors may be shortly thus stated:—

All moneys receivable by the Court of Chancery are paid into the Bank of England, to the credit of the Accountant-General. In the office of the latter, by an elaborate system of accounts, the evidence of what is due to each trust is carefully preserved; and all payments directed to be made by the court are effected through the medium of the Accountant-General, who re-demands from the Bank of England the necessary funds. A carefully devised system of checks and safeguards effectually protects against fraud in procuring money out of court; indeed, complaints have been sometimes heard that there is over-carefulness to a burdensome extent (*a*).

(*a*) By "The Court of Chancery (Funds) Act, 1872" (35 & 36 Vict. cap. 44) the Office of Accountant-General is abolished, and the duties,

Next let me mention the Registrars. On entering any of the courts of Chancery you will notice sitting underneath the judge, an official in wig and gown. This is the Registrar. His duties are, to sit in court, to attend to the causes argued and matters transacted sufficiently to appreciate their bearings, and to make a minute of the decree or order pronounced by the court. These officers exceed in number the number of courts. They attend in court according to a rota. When not in court, they are commonly engaged in settling, in presence of the solicitors or solicitors' clerks who attend upon them, the precise wording of the orders and decrees, the materials for which are furnished by their own minutes, by the indorsements on the briefs of counsel, and, as respects minor points, by the agreements or admissions of the professional gentlemen in attendance. It is stated by Mr. Hardy, in the preface to his catalogue of Lord Chancellors and other officers of the court, that there is evidence of the existence of these officers (the Registrars) so long ago as the year 1388 ; and they are distinctly mentioned under the names of "notarii sive

powers, and authorities of the Accountant-General are transferred to her Majesty's Paymaster-General, for whose default the Consolidated Fund of the United Kingdom is made liable to the suitors.

The principal novelty in the Act consists in the establishment of what is called a deposit account, to which all uninvested cash of suitors will be placed, and when so placed will bear interest at the rate of 2*l.* per cent. per annum (with the Income Tax thereon) ; the Consolidated Fund being made liable to make good the cash and interest, and the national debt of the country obtaining the benefit of the deposits, ultra the fixed interest.

The previous legislation, referred to in note (a), p. 55, *ante*, had given the country the benefit of the savings (or banking profits) made by the Court of Chancery : this Act gives, in effect, to the country any such future profits after providing the two per cent. interest.

“tabelliones,” in an order in Chancery of the time of Henry V. (a)

The next officers mentioned by me were the Examiners. Their duty was, until recently, of a very simple kind. Previously to the reforms of 1852, the evidence in Chancery suits was taken by means of written interrogatories, prepared by counsel, and kept carefully secret until the time came for examining the witnesses. Then the witnesses attended at the Examiner's office. The Examiner read the written interrogatories, and, with the assistance of his clerk, took down the witnesses' answers. Now, as you are probably aware, the examination is conducted before the Examiner *vivâ voce*, in presence of the solicitors and counsel on both sides (b).

Of the functionaries of subordinate rank, the Masters alone remain to be mentioned. I said just now, that the office would shortly be matter of history only; but some few of the facts connected with it seem of sufficient interest to deserve mention.

The chief, if not the only, business of the Masters or clerks, in the earliest times of the existence of the office, was to prepare the original writs issuing from Chancery in common law actions. This has been already alluded to (c). You have also heard incidentally that the Master of the Rolls and one or two of the other

(a) Sanders's Orders in Chancery, vol. i. p. 7 c.

(b) Examination in chief is now *ex parte*; see Appendix, page xxii. The principal occupation of the Examiners at the present time consists in presiding at the cross-examination of witnesses who have made affidavits to be used upon interlocutory motions, or on motions for decree, or at chambers.

(c) See p. 11, *ante*.

Masters frequently sate on the bench with the Lord Chancellor, to assist him with their advice—as assessors, in fact. But the *chief duties* of the Masters in connection with the *equity business* consisted in conducting inquiries into matters referred to them by the Chancellor, and taking accounts. The history of the decline and fall of the Master's office has yet to be impartially written. No doubt the sins of that branch of the court were great; and perhaps, if it were really necessary to sacrifice a Jonah to the storm of popular discontent, the most offending member of the Chancery system was selected. However this may be, in 1852 arrangements were made for the extinction of the Masters' office; the proposed substitute being, that the judges should themselves transact, in chambers of their own, the work (at least the *legal* work) formerly done by the Masters, the judges receiving the assistance of competent clerks, to whom should be left matters of mere routine, such as taking accounts. To the new system we owe the office of Chief Clerk, two (a) of whom are attached to each judge. It would be rash to express any very decided opinion respecting a system which has been so short a time at work; but we may venture to indicate the actual gain and probable drawbacks.

And first, expedition has been gained;—of this there can be no doubt. On the other hand, it is difficult to say that the original intention, that the judges should work their own business in chambers, has been fully carried out. The Chief Clerks, practically, have cogni-

(a) The number has since been increased.

sance, in the first instance, of all matters, however important the law involved may be; and the increasing power of these officials cannot be viewed without some feeling of alarm. No doubt it has been stated distinctly on the bench, that it is the positive right of the suitor to have every matter heard by the judge himself (*a*); but something more than this seems to be wanted, if I may presume to say so; namely, a system of conducting the chamber business of the court, which, instead of compelling the suitor to claim the privilege of having his case adjudicated upon by the judge, should, *as of course*, bring before the judge himself the more important descriptions of business. Unless this be accomplished, the relief in getting rid of the delays in the Masters' office may, I fear, be seriously counterbalanced by new vital defects; and our late reforms may afford another instance of the difficulty of driving out one evil without admitting another.

The foregoing sketch of the court by which our equity jurisprudence is administered would be obviously imperfect without some notice of the supreme court of appeal, by which the decisions of the Court of Chancery already spoken of are reviewed. I mean, of course, the House of Lords. The appellate jurisdiction of the House of Lords in equity causes is a singular instance of a jurisdiction successfully usurped, at a late date of our constitutional history, in defiance not only of all principle, but of a previous report of a committee of the usurping body.

(*a*) See *Hayward v. Hayward*, *Kay's Rep.*, Appendix xxxi.

And, first, as respects principle.

Theoretically, the Crown is the fountain of all justice. And, in accordance with this the true principle, the appellate jurisdiction of the House in common law suits is based upon a writ of error from the Crown, suggesting information that the proceedings in the common law courts are erroneous, and calling upon the House of Lords to review the record. This principle, according to which all justice flows from the Crown, applies, perhaps, more strongly to suits in Chancery than to any other legal proceedings; for the Chancellor really sits as the King's deputy (*a*), and the Court of Chancery is so essentially the King's court, that in suits to which the Chancellor is a party, or when there happens to be no Chancellor or Keeper of the Seal, the proper course is to address the bill "To the King's Most Excellent Majesty in his High Court of Chancery," instead of to the Lord Chancellor. Under these circumstances, the existence of a right of appeal to the House of Lords, without any intermediate action or motion on the part of the Crown, is theoretically absurd. It amounts to a right of appeal from the sovereign to one branch of the realm. But however this may be, the right is well established. The suitor who is aggrieved by the decision of the Court of Chancery simply presents his petition of appeal, addressed—"To the Right Honourable the Lords spiritual and temporal in Parliament assembled," who thereupon proceed to adjudicate.

(*a*) See the instance mentioned *supra*, p. 45, note (*a*), of a petition to the monarch himself.

But further, the circumstances under which the jurisdiction was usurped, render the usurpation still more extraordinary. The want of a court of appeal from the equity decisions being felt so early as Elizabeth's time, the matter was referred to the judges, who certified that the Queen might on petition refer a decree of the Court of Chancery to the judges, to examine and reverse it. In the time of James I., an attempt was made to establish a right of appeal by petition to the House of Lords; but a committee of the House itself reported as follows:—"That divers lords of their sub-committee (appointed to search for precedents) cannot find that the word 'Appeal' is usual in any petition for any matter to be brought in hither; but they find that all matters complained of here were by petitions only, the ancient accustomed form thereof being, 'To the King and his Great Council' " (a). In fact, there was no precedent. In the reign of Charles II. we find the House of Lords involved in violent disputes with the Lower House respecting not only the assumed jurisdiction in appeals from the Court of Chancery, but also respecting the right then arrogated by the House of Lords of entertaining suits not merely as a court of appeal, but as a court of original jurisdiction. The ultimate result of these disputes was, that the House of Lords abandoned the latter claim; and its usurped jurisdiction in Chancery Appeals was tacitly submitted to and gradually established.

(a) Printed Journals of House of Lords, vol. iii. p. 189. Dec. 10, 1621. The report continues, "And they cannot find but only one precedent of this nature, which was a complaint, by petition, against *Michael de la Pole*, Lord Chancellor, for matter of corruption."

It is instructive to observe the retributive justice which has pursued this usurpation. The appellate jurisdiction in common law suits has, with the assistance of the common law judges, been not altogether unsatisfactorily exercised. That from the equity courts has been a continual subject of grievance. In Lord Eldon's time, it was complained that Lord Eldon in the House of Lords affirmed Lord Eldon's judgments in the Court of Chancery. In our own times we have seen the following result (a) :—

1. A decree by the present Master of the Rolls.

2. That decree affirmed by the court of appeal. Lord Justice Knight Bruce being for an *affirmance*; but the present Lord Chancellor (b), then Lord Justice, *dissenting*.

3. The decree so affirmed reversed in the House of Lords by the present Lord Chancellor and Lord Brougham; Lord St. Leonards dissenting.

Thus in the end the opinions of Lord St. Leonards, Lord Justice Knight Bruce, and Sir J. Romilly were overruled by those of the present Lord Chancellor and Lord Brougham.

It is difficult to be satisfied with a court of appeal so organized as to admit of such a result. And that the efforts lately made to obtain a more satisfactory constitution of the ultimate court of appeal of the kingdom will be renewed, cannot, I conceive, be doubted.

(a) The case alluded to was *Money v. Jorden*, 15 Beavan, 372; 2 De Gex, Macn. & Gor. 318; 5 House of Lords Cases, 185.

(b) Lord Cranworth was Chancellor at the time of the delivery of the lectures.

Gentlemen, my necessarily imperfect sketch of the history and constitution of our equity tribunals must end here. I have, in this lecture, done my best to convey to you some idea of the machinery itself by which equity jurisprudence is administered. In my next lecture it will be my endeavour to show you this machinery actively in motion.

LECTURE III.

THE present lecture, gentlemen, is intended to complete what I may call the first division of my course.

It will be my object this evening to convey to you some general notions respecting the procedure of the Court of Chancery,—to show you, in fact, the method by which the courts described in my last lecture administer the system of jurisprudence, which was somewhat faintly and imperfectly shadowed forth in my first.

Obviously, wherever there is a system of jurisprudence and a staff of judges to administer it, the latter must be guided in their administration by some fixed and definite rules. St. Louis, King of France, sitting under an oak at Vincennes, and dispensing justice to his subjects in person, presents a picture which, however delightful, cannot be made a reality in modern times. To guard against surprise by either litigant party upon the other, written statements of the grounds of complaint of the plaintiff, and grounds of defence of the defendant, are indispensable; and to ensure the orderly conduct of proceedings, regulations for the guidance of suitors must be laid down. In fact, there must be written pleadings and rules of practice, or what I may term in its entirety a code of procedure.

Now, in reference generally to the subject of procedure, I would observe that it is impossible to determine *in the abstract* that any particular system of procedure is best. The procedure must depend, to a great extent, on the nature and constitution of the tribunal, the working of which it is intended to regulate. For instance, we have in this country, in full operation, two systems of pleading and practice—that of the common law and that of equity—differing most widely; and yet, having regard to the essentially different constitutions of the two tribunals, we cannot fail to see that each, notwithstanding its particular advantages and disadvantages, is best adapted for its own judicature.

It will, I think, be not uninformative if, before proceeding to the particular subject of this evening's lecture, I point out very briefly the broad differences between the common law and equity jurisdictions in reference to the *constitution of the tribunals* and *method of procedure*.

In regard to the *constitution of the tribunals*, the distinctive feature of the common law is, that the judicial duties, instead of resting wholly with the judge, as in equity, are parcelled out between the judge and jury. In the equity courts, the judges are judges of matters of fact as well as of matters of law (*a*). At common law, the jury are the judges of fact, and only the *law* is left for the decision of the judge or court. Thus, supposing an action at law to involve the two following

(*a*) Since the above was written, provision has been made by statute for trying questions of fact in Chancery by a jury.—21 & 22 Vict. c. 27, ss. 3—6.

points, viz., first, whether a particular deed was or not executed upon a particular day; and, secondly, whether upon the true construction of it a particular person took an estate in fee or an estate in tail; the first point would be one for the decision of a jury, the second for the decision of the court; whereas, upon the same two points occurring in an equity suit, the judge would determine both.

Next, as to *procedure*. Flowing from this division of judicial functions between the judge and jury, or at least so intimately connected with it that it is difficult to say how much of the connection is essential and how much accidental merely, we have two great distinctive features in common law procedure as contrasted with that in equity, viz.:—

First. A scientific system of pleading intended to bring the matters in controversy to certain definite issues.

Secondly. Examination of witnesses in open court, in presence of the judges of fact.

In reference to the first of these, it is hardly too much to say, that the common law system of pleading, if not historically a consequence of the severance of the functions of the judge from those of the jury, is almost a necessary condition to the working of any judicial system in which such severance exists. Unless, indeed, the attack and defence be brought systematically to certain issues upon matters of fact, and certain issues upon matters of law, the trial of facts by a jury would be hardly possible. The task of selecting the issues from a mass of voluminous statements—such as occur in

Chancery pleadings, for instance—and of distinguishing the issues of fact from the issues of law, must in any case be laborious ; but to perform it in the heat and hurry of a *Nisi Prius* trial seems next to impossible. It is almost a matter of necessity that the judge should be able to refer to the pleadings, and, addressing the jury, say, The questions which you have to determine are, 1st, so and so ; 2ndly, so and so, &c. &c.

Time does not permit me to discuss in detail the question how far a similar system of scientific pleading would be suitable in equity. My own opinion is against its suitability. In point of fact, however, no attempt is made in equity pleadings to reduce the case to any clear definite issues. The statement of the plaintiff's case in the bill differs little in language or form from any other statement of facts which might be drawn up for the information of third parties, say an application to a Government Board. The defendant's answer usually admits, denies, or qualifies *seriatim* each statement in the bill ; and occasionally, before proceeding to notice the statements in detail, the defendant gives a general history of the case from his own point of view. The issues, both of fact and of law, are thus often involved in large masses of statement, and have to be selected, so to speak, by the judge who tries the cause, with the assistance of the arguments of counsel ; a task which is, however, rendered feasible by the opportunity of referring to the pleadings and written evidence as frequently and leisurely as he may wish.

Secondly, as respects the second distinctive feature

of the common law, viz., examination of witnesses in open court. Probably few here present are ignorant that at Nisi Prius trials the witnesses give their evidence orally, in presence of the jury; while upon the hearing of equity causes, the evidence consists of affidavits, or of depositions of witnesses taken down previously (a).

It would, perhaps, be too much to say that oral examination of witnesses in open court is absolutely necessary to the working of the jury system. The written evidence might, of course, be read to the jury, by the judge, just as the Nisi Prius judge reads or refers to his notes of the evidence previously given *vivâ voce*; but the chance of its commanding the attention of untrained minds, without the previous *vivâ voce* statement, would be very slight.

On the other hand, the difficulties which attend the introduction of oral examination into the trial of equity causes are not trifling. The equity judge, it must be remembered, performs the threefold functions—of *pleader*, in selecting the issues for himself; of *judge*, in deciding the law; and of *jury*, in deciding the facts. To cast upon one already so burdened the additional task of controlling the current of *vivâ voce* examination; of taking notes of the evidence; and of supplying, in reference to observation of demeanour, the place of twelve jurymen; would seem to be an

(a) This must be now qualified, so far as the new order of court as to evidence, made the 5th February, 1861, provides for *vivâ voce* examination and cross-examination at the hearing. See Mr. Barber's Statement, Appendix, p. xxii.

experiment, the practical success of which must be doubtful (a).

The results of our comparison are then as follows:—

First. That the broad difference between the composition of the common law and equity tribunals consists in the existence of the jury system as part of the former, and its absence as part of the latter.

Secondly. That a scientific system of pleading to issue is essential to the working of the common law jury system, but it would not be appropriate in equity suits.

Thirdly. That *vivâ voce* examination of witnesses in open court is an appropriate, if not essential, adjunct to the jury system; while it remains for further experience to determine how far it can be usefully applied to the trial of equity causes.

I abstain, somewhat reluctantly, from commenting on what seem to me to be the actual advantages and disadvantages of the two systems of procedure, because I feel that I have already digressed at some length from the immediate subject of my lecture (b).

Returning to *this*, and observing that I have undertaken to give you “a general outline of a suit in equity,” it seems to me that I shall be able to present a more lively picture to your minds if, instead of merely stating in the abstract the different stages through which a suit may pass, I assume the existence of some particular suit for some particular purpose,

(a) The great length of time consumed in some of the recent hearings on *vivâ voce* evidence seems to support these observations.

(b) Some observations on this point, which originally formed part of the lecture, but were omitted on account of their length, will be found at Appendix E.

and conduct it through a course of imaginary litigation to a final close. Indeed, it will afford greater facility of illustration, if I imagine two suits of different kinds.

You recollect my observations respecting the great practical division of the business of the court into *litigious* and *administrative*. I will take a suit of each sort. You must understand that my selection is made, not with reference to any scientific classification of equity, but merely for the purpose of exhibiting the different phases of existence that each of these different kinds of suit not uncommonly passes through.

My specimen of the first, or *litigious*, class shall be a suit for the purpose of setting aside a deed, as having been fraudulently obtained; that of the second, or *administrative*, class, a bill for administering the trusts of a testator's will.

And now, let us commence our specimen suit of the *litigious* class. Practically, of course, the first step will be the collection by the solicitor of the facts and circumstances of fraud under which the deed was obtained, and the preparation of a connected statement of those facts and circumstances for the advice of counsel. Then will follow the preparation of the draft bill by counsel. After the draft has been prepared, the bill has to be printed (formerly it used to be engrossed on parchment), and the solicitor corrects the proof sheets of the bill, and passes it through the press.

Up to this moment, be it observed, there is no suit in existence. The filing of the bill, which is done by leaving at the office of the record and writ clerks one of the printed copies, is the first step in the suit. In a

common law action, the writ is the first step. Formerly there was a writ in equity suits also, viz., the famous writ of subpœna, the invention of which is commonly, though erroneously, ascribed to John de Waltham, Master of the Rolls of the time of Richard II. But the writ of subpœna did not precede the bill, as the common law writ precedes the declaration, but followed it. It was, in fact, a writ commanding the defendants, under a penalty of £100, "*subpœnâ centum librarum*," to appear and answer the bill. The pecuniary penalty was a pure fiction (a). The true *modus operandi* was to treat a defendant who did not appear and answer as a contemner of the jurisdiction of the court, and to send him to prison. Latterly, I think about the year 1833, the form of the writ of subpœna was modified so as to represent accurately the penalty which the defendant really incurred by failing to appear and answer. It ran : " Upon pain of an attachment issuing against your " person."

This procedure was, however, still open to two objections, namely, the word " attachment," in the *subpœna*, being a technical term, was not adapted to convey to the person served any very distinct notion of the penalty incurred by his default ; and the writ itself contained no information at all respecting the nature of the plaintiff's

(a) The same fiction was observed from early times, in reference to the writ of injunction. A decree of the reign of Richard III. runs thus :— "*Injunctum fuit infrascripto Thome Hunston, quod ipse subpœna "forisfacture mille librarum, &c. &c. per se aut per alium seu per alios "nullo modo ulterius prosequaretur in loquela," &c. &c.*—*Calendars of Proceedings in Chancery*, vol. i. p. cxiii. And it is still observed ; see Braithwaite's Record and Writ Practice, p. 227.

claim. This information the defendant could obtain only by applying at the record and writ clerks' office, and procuring (at a considerable expense if the bill were long) an office copy of the bill.

In 1852, both these defects were remedied. The writ of subpoena was abolished altogether; and now, instead of the plaintiff serving the defendant, as formerly, with a writ which informed him that a bill had been filed against him in Chancery, and compelled him to go to the record and writ clerks' office and obtain, at considerable expense, an office copy of the bill, the plaintiff serves the defendant with one of the printed copies of the bill, which contains an indorsement as clear and as free from technical language as could be devised. It is in these words :—“ We command you, that within eight “ days (a) after service hereof on you, you cause an “ appearance to be entered for you in our High Court of “ Chancery to the within bill of complaint of the within- “ named A. B., and that you observe what our said “ Court shall direct.” The following note (b) is added to the indorsement :—“ If you fail to comply with the above “ directions, you will be liable to be arrested and impri- “ soned. Appearances are to be entered at the Record “ and Writ Clerks' Office, Chancery Lane, London.”

(a) If the bill is to be served out of the jurisdiction, the court limits a special time for appearing.

(b) The note is now as follows : “ If you fail, &c., the plaintiff may enter “ an appearance for you, and you will be liable to be arrested and im- “ prisoned, and to have a decree made against you in your absence.” When the defendant is either a corporation or a peer who has failed to appear after letters missive, or when the bill is to be served out of the jurisdiction, special forms of note are used, as to which see Braithwaite's Record and Writ Practice, p. 29.

And now a few words about the frame of the bill.

It would be difficult to imagine a less technical document. It is in form a petition to the Lord Chancellor. In our particular suit all the facts and circumstances of fraud—in fact, the whole story of the imposition alleged to have been practised—would be told with just so much of detail as might be requisite to convey an accurate view of the plaintiff's case ; and the bill would conclude with a prayer that the deed might be declared void, as having been fraudulently obtained, and be set aside accordingly. And here allow me in passing, to give a short illustration of the difference between equity and common law procedure. I am unable to compare the bill in my supposititious case with any common law declaration ; but allow me to assume that the defendant in equity, had before the filing of the bill to set aside the deed, commenced an action at law founded on the deed against my now plaintiff in equity. The defendant at law (our plaintiff in equity) would, under such circumstances, instead of setting out in detail all the facts which are stated in the bill, have pleaded simply, "That the said deed was procured by fraud." Upon this plea being traversed (*i. e.*, the truth of it denied), the cause would have gone down to trial, the facts and circumstances of fraud would have been elicited by *vivâ voce* examination in open court, and the jury, assisted by the directions of the judge, would have said whether the plea was proved or not.

But to return to my suit. The defendant being thus in possession of the general story told by the plaintiff, we have to consider his line of action. His first step

obviously is to enter an appearance, in obedience to the indorsement on the bill. We may assume, I think, that this is done for him by some solicitor whom he consults ; but he may, if he likes, do so in person.

Next, how is the bill to be met? Speaking generally, where a plaintiff comes before a court of equity, making a statement, and founding on that statement a claim to relief, the defence of the defendant, if he have a valid one, must fall within one of the three following heads :—

1. The plaintiff may have stated the facts accurately, so far as is material ; and yet, upon a just view of the case, he may not be entitled to relief in a court of equity. Thus, in our supposititious case, the facts and circumstances stated by the plaintiff as amounting to a case of fraud, may be insufficient to establish a case of that kind.

2. The plaintiff's bill may set forth facts amounting to a case of fraud, and the statements, so far as they go, may be accurate ; but the bill may have suppressed all notice of some other facts affording a defence ; as, for instance, in our selected case, a compromise founded on valuable consideration and entered into subsequently to the fraud.

3. The defence to the plaintiff's bill may consist in the detailed disproof of some and explanation of others of the facts and circumstances relied on by the plaintiff, the effect of such disproof and explanation being to give an entirely new complexion to the case.

To each of these three heads there belongs an appropriate technical defence in equity suits.

In the first case the defence is by *demurrer*. The defendant says, "Admitting, for the sake of argument, that every word you have stated is true, still I contend you have made no case for relief in equity."

In the second case the defence is by *plea*. The defendant pleads (according to the facts supposed) that, subsequently to the alleged fraud, the plaintiff compromised the matter with him.

In the third case, the defendant puts in an *answer* to the bill, meeting in detail—by denial, explanation, or otherwise—the statements therein contained.

Some additional explanation seems necessary in reference to each head of defence. And first, I would not have you believe that a bill of the kind which I have selected for illustration (viz., a bill to set aside a deed on the ground of fraud) is often demurrable. I never knew one so. The plaintiff more commonly overstates his case, and it fails, if at all, in the proof. Next, it would be a serious mistake to suppose that because a bill is demurrable, therefore it should be demurred to. On the contrary, where a bill is loosely drawn, and the facts and the grounds of relief are imperfectly stated, and yet it is possible that the plaintiff might, by care and pains, strengthen his case, nothing could be more dangerous to the defendant's interest than to demur; for upon demurrer filed, the plaintiff perhaps either amends at once and betters his pleading; or the demurrer is set down for argument, the legal features of the case are sifted, the demurrer is perhaps allowed with costs, but the plaintiff has leave to amend his bill. He does so, having had the

full assistance of the argument before the court; and in some cases this assistance is well worth the costs of the demurrer which he has to pay. The cases in which a demurrer may safely be resorted to by a defendant are mainly those where the litigation turns wholly on the construction of written documents, all of which are fully set out in the bill: as, for instance, a bill for specific performance, where the question is whether a long correspondence fully and fairly set out on the bill amounts to a contract for sale of lands within the statute of frauds; or a bill filed against a trustee by a plaintiff, alleging himself to be a *cestui que trust*, where the question is whether the plaintiff really takes an interest under the instrument of trust.

I think we may assume, then, that our particular defendant does not demur.

But secondly, as respects a *plea* in equity, my supposed compromise would be a good case for a plea; but as a general rule, a plea in equity is not easily drawn. The defence is often anticipated by the bill. Thus, a bill is filed, praying an account of transactions between the plaintiff and defendant, although there has, in fact, been an account stated and settled between them. The plaintiff, foreseeing that the defendant may plead the account stated, mentions it in the bill, but states at the same time in detail a variety of circumstances, say of fraud or concealment on the part of the defendant, rendering it inequitable for the defendant to rely on the account stated. The bill in fact, is made to combine what in common law language would be a declaration, an imaginary plea by the de-

fendant, and a replication by the plaintiff. Now then the defendant cannot plead the account stated, without at the same time answering *seriatim* all the facts and circumstances, on which the plaintiff has in his bill relied as avoiding the effect of the statement of account. This is commonly so difficult and troublesome, that the defendant's counsel resigns himself to meeting the case by answer.

But suppose a plea feasible, and suppose it drawn and filed. It remains that I should show you how it is dealt with. A plea in equity possesses a peculiarity distinguishing it at once from a plea at law ; viz., that it is almost necessarily true. Subject to certain limited exceptions, such as pleas of matters of record, the defendant must himself swear to the truth of his plea. It results that practically the only questions which arise in reference to a plea in equity are : first, whether it is technically sufficient, that is, well pleaded in form ; and, secondly, whether it amounts in substance to a sufficient defence to the suit. In fact, a plea in equity *must*, as a rule, succeed, unless it be bad, or what at law would be called *demurrable*. The mode, however, of trying the validity of a plea in equity is not by the plaintiff demurring to it, as at law. The equivalent step is setting it down for argument before the judge. Thereupon the counsel for both sides attend, and after hearing their arguments, the judge decides, either that the plea is good, and *allows* it, or that it is bad, and *disallows* it ; in the latter case, however, frequently directing it to stand in lieu of an answer, so far as it goes, without prejudice

to the plaintiff's right to call for a fuller answer, or, as the technical phrase is, with liberty for the plaintiff to except.

It may be asked by some of you, what becomes of the suit, supposing a plea to the whole bill to be allowed? Practically, the suit is at an end. In strictness the plaintiff has a right to take issue upon the plea, and to go into evidence to disprove it. I recollect, however, many years since, when a pupil, asking the equity draughtsman, in whose chambers I was working, whether he ever knew evidence gone into upon a plea, and he said no. Certainly in my own more limited experience, I have never known a case.

But, thirdly, the defence by *answer* remains. And here I would speak of an ingredient in equity pleadings hitherto left out of sight, viz., the *interrogatories*. These used formerly to be included in the bill itself; now they constitute a separate document. They are to be filed by the plaintiff within eight days after the time limited for the appearance of the defendant who is sought to be interrogated (a). It is important that you should pay attention to this word *limited*. It has occasionally been overlooked, and considerable inconvenience has resulted to the plaintiff. Thus the defendant has been dilatory in entering an appearance, and the plaintiff, supposing a certain number of days from the defendant's *appearance* to be allowed for filing interrogatories, has suffered the eight days from the time *limited* for appearance to elapse, and then has been obliged to go to the court specially,

(a) 16th order of 7th Aug., 1852, now rule 2 of consol. order xi.

at some little expense, for leave to file interrogatories (*a*).

The filing of interrogatories is optional on the part of the plaintiff; but the defendant, even if none be filed by the plaintiff, has equally the right of putting in an answer. After filing the interrogatories, the plaintiff is bound to deliver a copy of them to the defendant's solicitor, either within eight days after the time allowed for appearance, or, should the defendant prove dilatory in appearing, then within eight days after appearance. If interrogatories are delivered, then as a general rule, unless the defendant can refuse to answer on the ground that to do so would expose him to penalties or criminal proceedings, or involve a breach of professional confidence, or on some other special ground, he is bound to answer the interrogatories. If he do not answer fully, the plaintiff excepts to the answer, stating in what respect he considers it insufficient; and the court, on argument, decides on the sufficiency or insufficiency.

It is at the stage of the proceedings which we have now reached, that the step of moving for production of documents commonly occurs. A plaintiff in equity has a right to ask the defendant whether he has not in his possession documents supporting his (the plaintiff's) case, and to inspect any relevant documents which the defendant admits himself to have. Under

(*a*) See 2 Smale & Giffard, iii. But the delay is often unimportant, the clerks of records and writs holding, that where (as occurs in a large proportion of cases) the defendant is not served, but his solicitor accepts service, giving an undertaking to appear, there is no time "limited for appearance" within the meaning of the order.

the practice previously to the late alterations, an interrogatory as to documents was invariably inserted in the bill itself. This the defendant met by appending to his answer a schedule or list of documents, and the plaintiff, by his counsel, moved in open court for the production of the documents scheduled by the defendant. The question, whether a plaintiff was entitled to the production of particular documents, was frequently one of the most embarrassing that could arise; the principles being by no means authoritatively ascertained, and the decisions most contradictory. The effect of the new practice has been to transfer altogether to chambers this head of discovery. Now the plaintiff takes out a summons at chambers (*a*), upon which an order is made directing the defendant to file, within a limited time from service of the order, an affidavit, stating what documents he has in his possession relating to the matters in question in the suit; and upon the affidavit being filed an order for production is made, extending to the documents admitted by the defendant's affidavit to be in his possession, with the exception of such as are privileged from production (*b*).

Under the present altered practice, the bill more commonly omits the charge as to documents on which the corresponding interrogatory would be founded, and

(*a*) See 15 & 16 Vict. cap. 86, s. 18; 15 & 16 Vict. cap. 80, s. 26; and general notice of 10th Nov., 1852, as to applications to be made at chambers.

(*b*) The above statement is somewhat brief. The course of practice will be found more fully explained in Mr. Barber's Statement, Appendix, p. xii.

the interrogatory itself is also omitted. Indeed, it would be useless to insert the interrogatory, since, if the defendant answers insufficiently, an exception would only call forth the disapprobation of the judge, who would say (this used to occur when the new practice first came into operation), Why except, when you can go to chambers and get production there, more expeditiously, and at less expense? (a)

The advantage of the altered practice on the score of expense is considerable, but there are drawbacks. Under the new practice, the plaintiff's equity counsel commonly sees neither the affidavit made on the question of production, nor the list of documents; and, occasionally, the importance of taking out the usual summons is overlooked altogether. Very frequently, in my own experience, the plaintiff's counsel finds the answers of the defendant sent to him in order that he may advise whether they are sufficient (*i.e.*, whether they fully and properly answer the interrogatories), and also *as to the further conduct of the suit*, before any step has been taken to compel production. It is obvious that, until production has been obtained, it is impossible in a litigated case to form a correct opinion

(a) *Law v. London Indisputable Company*, 10 Hare, App. xx. ; *Perry v. Turpin, Kay*, App. xlix. See, too, *Kidger v. Worswick*, 5 Jurist, N.S. 37. The decision *contra*, in *Hudson v. Grenfell*, 3 Giffard, 388, is opposed to the views stated by the same judge in *Barnard v. Hunter*, 1 Jurist, N.S. 1065. The tendency of the recent decisions has been to make the chamber practice as to production of documents more effectual; see *Noel v. Noel*, 32 Law J. (N.S.) Chanc. 676; 1 De Gex, Jones & Sm. 468; and therefore to discourage the use of the interrogatory as to documents, except in special cases.

respecting further proceedings. Thus, in my supposed suit, the motion for production may lead to the disclosure of documents, overlooked in the answer, which may materially support the plaintiff's case, or render necessary some variation in the statement of it by amendment. This is a branch of proceeding, gentlemen, which peculiarly concerns you; and you may set it down as a good rule to apply for production at chambers at the latest upon the answer coming in.

There is another practical point arising at this stage of our suit to which I particularly desire to direct your attention. Under the new procedure it is the right of a *defendant* to compel production of documents by the *plaintiff*, as soon as he, the defendant, has fully answered the plaintiff's interrogatories (a). I am disposed to think this privilege even more valuable to the defendant than the corresponding one commonly exercised by the plaintiff, and for the following reason. The plaintiff's bill, it must be recollected, is based merely upon the written instructions of the plaintiff's solicitor, which, again, have in many cases for their foundation only the verbal statements of the plaintiff himself to the solicitor, made without the sanction of an oath. That documents overlooked by the bill, but supporting the defendant's case, should be found therefore in the plaintiff's possession, is even more probable than that documents overlooked by the answer, supporting the plaintiff's case, should be found in the defendant's possession. Indeed, I feel this so strongly that, as a general rule, when settling an answer in

(a) 15 & 16 Vict. cap. 86, s. 20.

a litigated case, I append now a note at the foot, advising the defendant to take the usual steps to compel production by the plaintiff within a reasonable time after answer filed.

Another privilege conferred by the late practice on *defendants*, which, if exercised at all, will be exercised at the stage of the cause which we have now reached, is that of filing interrogatories for the examination of the plaintiff.

Under the old practice, if the defendant felt sure that the plaintiff had within his own breast information which would support the defence, his only course was to file a cross bill. *Now*, his object is accomplished by means of cross interrogatories, prefixing a concise statement of the subjects on which discovery is sought (*a*).

It must be remembered, in reference to both these privileges conferred upon defendants by the new practice, that, although the defendant is not at liberty to exercise them until he has put in a full answer, he is not bound to wait until the six weeks, at the end of which the answer is, in the absence of exceptions, conclusively held to be sufficient, have expired. He may move for production, or file his interrogatories, at once. But in the former case, the court would not compel the plaintiff to produce the documents, without first giving him an opportunity of considering whether he preferred excepting to the answer as insufficient; and in the latter case, should the answer be excepted to, and be found insufficient, the interrogatories

(*a*) 15 & 16 Vict. cap. 86, s. 19.

would, upon motion by plaintiff, be taken off the file (a).

But to return to the main conduct of the suit. After the defendant has answered the interrogatories, and the plaintiff's solicitor has obtained an inspection of documents, the question of *amendment* arises. Should the answers and documents disclose facts calling for some alteration of or addition to the plaintiff's case, the plaintiff effects his object by applying for leave to amend, and his counsel interweaves the new matter into the story told by the old bill. If the amendments introduced between any two words exceed in length 180 words, the bill must be reprinted (b). If further discovery is required from the defendant, in reference to the amendments, additional interrogatories are filed, and must be answered. And even if no further interrogatories be filed, the defendant may, if he think fit, put in a further answer. Then comes a formal replication by the plaintiff, and the cause is at issue.

And now as to the evidence. This is adduced, *either* by affidavits sworn voluntarily by the plaintiff's and defendant's witnesses, who, at the option of the party against whom their evidence is given, are liable to be cross-examined *vivâ voce* before the examiner; *or* by a *vivâ voce* examination and cross-examination before the examiner in the first instance; *or* partly in one

(a) See *Lafone v. Falkland Islands Company*, 2 Kay & Johnson, 276; and *Walker v. Kennedy*, 3 Jurist, N.S. 481.

(b) There cannot be a partial reprint. See *Naylor v. Wright*, 3 Jurist, N.S. 95; s. c. 7 De Gex, Macn. & Gor. 403.

mode and partly in the other (a). At this stage of the litigation our equity procedure proves, it must be confessed, in cases of the class now under consideration, very inadequate. The question of *fraud* or *no fraud* may depend—in the larger proportion of cases *does* depend—upon the degree of weight to be attached to the evidence of the witnesses; and the judge who is to decide on the effect of the evidence merely reads it in the shape of affidavits, or in that of a continuous narrative, compiled, so to speak, by the examiner in Chancery before whom the witnesses have been examined *vivâ voce*. The difficulties which must attend a *vivâ voce* examination in open court, before a single judge who is already loaded with the burden of selecting the issues from the mass of pleadings, and of performing the double functions of judge and jury, have been before alluded to. Still the advantages that might be expected from a successful introduction into our equity practice of oral examination in open court, in those classes of litigation in which *vivâ voce* evidence is essential to eliciting truth, appear so great, that the absence of any fair experiment of the feasibility of the step seems a subject of legitimate regret. The only approach to experiment hitherto attempted is the enactment of the 39th section of the Chancery Procedure Act, 1852 (b), which provides that, *upon the*

(a) The practice, as here stated, was that existing under the 4th general order of Jan. 13, 1855 (afterwards consol. order xix, rule 3), then in force. For the existing practice, see Mr. Barber's Statement, Appendix, page xxii.

(b) 15 & 16 Vict. cap. 86. This enactment was based on the recommendation of the Chancery Commissioners of 1850 and 1851, whose views

hearing of any cause, the court, if it shall see fit, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs to be paid as it shall see fit. But you must perceive at once that the operation of this clause is seriously limited in consequence of the court's power to direct an oral examination being exercisable *at the hearing only*; and when the cause has reached that stage, both the court and the parties are loth to incur the further expense of a special oral examination in open court. What seems to me to be rather wanted is a power in the court, on the preliminary application, at chambers possibly, of either party, *before evidence is entered into*, to decide that the whole evidence, or the evidence of certain particular witnesses, shall be conducted in open court (a). But however this may be, it may, I think, be safely said that a *vivd voce* examination before the examiner presents no advantage over affidavit evidence, except as affording a convenient machinery for the examination of those witnesses who are unwilling to swear affidavits, and must, therefore, be summoned to give evidence in some form (b).

on the subject will be found stated in their first Report, pp. 21, 22. But the practice has been altered since the lectures were delivered. See now Mr. Barber's Statement, Appendix, page xxii.

(a) Rule 4 of the recent order (Feb. 5, 1861), as to evidence approximating closely to the suggestion here made, provides that, after issue joined, the Judge at Chambers may make an order that the evidence in chief, *as to any particular facts or issues*, shall be taken *vivd voce* at the hearing. The rule, however, is, I believe, but little resorted to in practice.

(b) This view has since prevailed, and *vivd voce* examination in chief in presence of counsel and solicitors on both sides is now no longer used, unless by special agreement between the parties. See Appendix, page xxii.

But while recognising the shortcomings of our equity procedure in the respect just mentioned, it is consolatory to be able to add, that the number of Chancery suits in which examination of witnesses in open court would really be of importance, is so small as compared with the total number, that the blemish is less serious than might be supposed. Affidavits, sworn as they are under the check afforded by the power of cross-examining the witnesses who swear them, and evidence by examination and cross-examination before the examiner of witnesses who are unwilling to depose by affidavit of their own accord, are found, in by far the larger proportion of Chancery suits, amply sufficient instruments for eliciting the requisite evidence.

And now at last our suit has been set down. It stands for hearing. It is heard ; if you wish to know how, I should advise you to go and sit in court some cause day. Supposing the hearing to run through all its stages, they would be as follows :—

1. The leading counsel for plaintiff opens the case.
2. Then plaintiff's evidence is read by the junior counsel for plaintiff, who afterwards comments on the evidence.
3. The leading counsel for defendant states defendant's case.
4. Evidence for defendant is read, and junior counsel for defendant comments thereon.
5. The plaintiff's leading counsel replies.

Then comes the judgment of the court, and then the decree, which is drawn up by the registrar in the mode which I pointed out in my last lecture.

Should either party be dissatisfied with the decree, and wish to appeal, the appeal assumes the form of a petition to the Lord Chancellor, stating, shortly, the fact of the decree, that the party appealing feels himself aggrieved, either in respect of the whole decree or some particular part of it, and praying that the case may be *re-heard*. The appeal is in theory *not* the removal of the cause from a subordinate court to a higher one (as in the case of, say, a writ of error from one of the common law courts to the Court of Exchequer Chamber), but a re-hearing of the same cause *in the same court*, by a judge of higher judicial authority. In fact, until the decree is actually enrolled, there is no limit to the *power* of the court to re-hear, except that imposed by the judicial status of the judge before whom a re-hearing is sought. Thus the Master of the Rolls, or the three Vice-Chancellors, may re-hear their own decrees (*a*), but not those of each other. The Lord Chancellor, on the other hand, has *power* to re-hear not only the decrees of the four inferior judges, but also those of any previous chancellor. It must not, however, be supposed that the suitor's *right* to a re-hearing is co-extensive with the *power* of the court to re-hear. On the contrary, the practice of the court is now clearly settled that there can be no second re-hearing before the judge of appeal, without leave obtained upon a special application (*b*).

(*a*) And also those of their predecessors in office ; see 53 Geo. III. cap. 24, sect. 2 ; 5 Vict. cap. 5, sect. 22.

(*b*) See the cases collected in *Moss v. Baldock*, 1 Phillips, 118.

There is, however, one mode in which a second re-hearing may take place without a special application. The suitor may, as of course, if he think fit, apply to have the cause re-heard by the same inferior judge before whom it originally came (and this step is occasionally adopted when the error in the decree is supposed to be due merely to some oversight of law or fact on the original hearing); and after this re-hearing by the inferior judge, the cause may be again re-heard, *as of right*, in the Court of Appeal.

In the celebrated case of *Brown v. Higgs* (a), which came before Lord Eldon, after having been heard and re-heard by Lord Alvanley, Master of the Rolls, Lord Eldon pointed out very forcibly the inconveniences of this course. He expressed himself thus :—

“ From this decree the cause comes on upon appeal.
“ A doubt struck me upon the argument, whether, after
“ a re-hearing at the Rolls, it was fit for this court, in
“ this place, to re-hear the cause; and whether it ought
“ not to go immediately to the House of Lords. It is
“ very obvious, if the rule laid down by Lord Thurlow
“ in *Fox v. Mackreth* (b) is a wholesome rule, that there
“ shall not be a second re-hearing, but the parties are to
“ go to the House of Lords; and on the other hand, if
“ the practice is according to what has happened in this
“ instance, that, where the case begins at the Rolls, it
“ may be re-heard there, and upon appeal in this place,
“ before it goes to the House of Lords; the suitors will

(a) 8 Vesey, 561.

(b) Reported 2 Cox, 158.

“ have to undergo the expense of four hearings in the
“ one case, and of three only in the other. But, what-
“ ever consideration may be due to that circumstance,
“ when occasion has presented it, as fit to be looked
“ to in future cases, I am not at liberty, the first time
“ that it has occurred in experience, to say, I decline
“ the duty of hearing the cause.

“ Upon conversation with persons who are prac-
“ tised in courts of equity, it has been thought, that
“ in cases of this sort the court might formally affirm
“ the judgment, and suffer the cause to go to the
“ House of Lords, by reference to other cases, where
“ it is conceived the parties mean to go to the House
“ of Lords. But I consider it contrary to the duty of
“ a court of justice, under any circumstances, so to
“ act. The suitors have a right to the deliberate
“ attention and deliberate judgment of every court, in
“ every stage in which, according to the constitution,
“ the cause may proceed; and there can be no cir-
“ cumstances under which I should ever permit myself
“ to say, as the cause is to go elsewhere I give no
“ judgment but *pro formâ*. If it should be thought
“ right to prevent this in future, I am of opinion it
“ will be much better done by some rule of practice
“ to regulate all cases in future, than by my taking
“ upon myself, in the first instance in which it occurs
“ in experience, to decline the duty of hearing and
“ considering the case.”

However, notwithstanding the force of these observa-
tions, the practice seems now to be settled that, the
suitor may, as of course, have his cause re-heard before

the original judge, and then claim a re-hearing before the Court of Appeal (a).

But the right of re-hearing may be intercepted by enrolment of the decree, which is a merely formal proceeding, amounting in substance to the deposit amongst the records of the court of a parchment copy of the decree, signed by the Lord Chancellor, or, if the decree be a decree of the Master of the Rolls, then by both the Master of the Rolls and the Lord Chancellor. This is a step which may be taken by any party to the suit, whether plaintiff or defendant, successful or unsuccessful. After this enrolment, no re-hearing can be obtained. The only remedy is by appeal to the House of Lords (b).

Now assume that in our imaginary suit the plaintiff's bill has been dismissed. If he wishes to go straight to the House of Lords, without passing through the intermediate stage of an appeal to the Chancellor or Lords Justices, he procures the decree to be enrolled, and presents his petition of appeal to the House. If, on the other hand, he intends to appeal to the Chancellor or Lords Justices, and is anxious to avoid the expense of being driven to the House of Lords, his solicitor takes care to enter a "*caveat*" against the enrolment of the decree by the defendant.

And here let me observe, that the power which an

(a) *Maybery v. Brooking*, 2 Jur. N.S. 76 ; s. c. 7 De Gex, Macn. & Gor. 673.

(b) The special proceeding by bill of review, founded either upon error of law appearing on the face of the decree itself, or upon new matter discovered after decree and which could not possibly be read when the decree was made, ought to be excepted to make this statement literally correct.

unsuccessful plaintiff has of carrying his appeal to the House of Lords direct, is one which, in the present state of House of Lords' business, may be most vexatiously used. Thus, a plaintiff files a bill, for specific performance, alleging himself to be purchaser. His bill is dismissed. He enrols his decree, and presents a petition of appeal to the House of Lords. The defendant is thus incapacitated from selling his property for about two years, the time required for the appeal to come on in its turn. The appeal comes on at the end of the two years, the appellant does not even appear, and the appeal is simply dismissed. This case has, to my own knowledge, actually occurred in practice (*a*); and the hardship is increased by the circumstance, that instead of substantial security to ensure costs being required, as in the case of writs of error from the common law courts, the appellant, in an appeal from the Court of Chancery, simply enters into his own recognisance, which may be worth nothing (*b*).

(*a*) The case referred to was *Honeyman v. Marryat*, reported at the Rolls, 21 Beavan, 15; and in the House of Lords, 4 Jurist, N.S. 23. The property respecting which the litigation arose consisted of a mansion-house and grounds in the neighbourhood of London, containing in the whole about eighty-seven acres. The house was unfurnished, and therefore the property could not be made productive by letting from year to year or for the summer season; and pending the appeal, a lease, even if not objectionable on other grounds, would have been out of the question. The sale of the grass crops barely covered the outgoings, and defendant, though he ultimately obtained a better price for his property, in substance lost two years' income. Yet a consultation, with the object of considering the expediency of a special application to the House to advance the appeal, only produced a joint opinion of counsel that the attempt would be hopeless.

(*b*) In the case referred to in the last note, no costs of the appeal to the House were recovered from the appellant.

But suppose our cause taken to the House of Lords by the plaintiff. Frequently, a simple reversal or affirmance will dispose of the case. Thus, a simple affirmance of the decree, which we have supposed to have been made, dismissing the plaintiff's bill, would admit of no further action on the part of either plaintiff or defendant. But suppose the House should think that the deed ought to be set aside on the terms of the plaintiff repaying to the defendant, with interest, certain sums received from him. The House would, under these circumstances, make an order embodying its views, and remit the suit to the Court of Chancery, to do what ought to be done in pursuance of the order.

The plaintiff would then apply to the Court of Chancery, that the order of the House of Lords might be made an order of the court, and a formal order to that effect would be made by the Chancery judge (a). Thereupon, the necessary accounts would be taken before the chief clerk, and the order would be carried out, on further consideration, in the usual way.

And now, my litigious suit being ended, let me take up my suit of the *administrative* class, viz., a bill for the administration of a testator's estate. This will be far more rapidly disposed of in its earlier stages. The only points for litigation are probably some doubtful clauses in the will. A short bill, bringing so many of the parties interested in the testator's estate before the court as the plaintiff's equity draughtsman thinks

(a) See *Man v. Ricketts*, 3 De Gex & Smale, 446.

sufficient to represent the different interests, is prepared, printed, and filed.

Frequently no answers are needed. The plaintiff gives notice that he intends to move for a decree in the terms of the prayer of the bill (*a*), and refers, at the foot of his notice of motion, to the affidavits filed in support, which are probably only a few formal affidavits echoing the statements in the bill. The cause is brought on as *short* with others of the same class, a step which practically gives it precedence over suits of the litigious class. In order to obtain this benefit, a certificate from counsel, stating that in his opinion the cause is fit to be heard as short, is required before the cause is put on the list of short causes. Previously to the hearing, minutes of the proposed decree are prepared by the plaintiff's counsel, and submitted to the junior counsel concerned for the different defendants. The cause then comes on on some short cause day. The senior counsel for the plaintiff states the material contents of the will, and reads the proposed minutes to the court, which are occasionally varied at the suggestion of the judge; and in ten minutes, or thereabouts, the materials of the decree have received the sanction of the court. The decree is mainly the decree of the counsel concerned in the cause, who arrange amongst themselves what accounts and inquiries are requisite for the purpose of eliciting the information necessary to guide the court in its ultimate administration of the property. After decree the cause goes into

(*a*) See orders 22—27 of August 7, 1852, as to practice on motions for decree. Now consol. order xxxiii, rules 4—9.

chambers (formerly it used to go into the Master's office), and then the accounts and inquiries directed by the decree are entered into and prosecuted. Thus the amount of the debts, legacies, and testamentary expenses is ascertained, accounts are taken of the real and personal estates, and, after an interval of say some six to twelve months or so in a simple case, the cause may be fit to be heard on further consideration (*a*). Then the court, deriving its facts from the certificate of the chief clerk, proceeds to give directions for winding up, so far as it can, the testator's affairs. The personal estate is ordered to be realized and invested in consols (*b*), and directions for the sale of the real estate, or if it is to be preserved in specie, directions respecting the management and mode of dealing with the rents, are inserted in the order of the court, called the order on further consideration. At this stage again, frequently, clauses of doubtful meaning in the testator's will have a construction put upon them by the court. Finally, supposing the testator's will to contain continuing trusts, such as a life estate, or life estates, directions are given for applying the income in accordance either with the apparent meaning of the

(*a*) See for a fuller sketch of proceedings subsequent to decree and down to the final order, Mr. Barber's Statement, Appendix, pp. xxx—xxxv.

(*b*) Cash under the control of the plaintiff may now (see Order of Feb. 1, 1861) be invested not only in Three per Cent. Consols, Three per Cent. Reduced, and New Three per Cent. Annuities, but also in "Bank Stock, East India Stock, Exchequer Bills, and 2*l.* 10*s.* per Cent. "Annuities, and upon mortgage of freehold and copyhold estates in "England and Wales."

will, or, in cases of doubt, with the true construction of it as ascertained by the court.

Gentlemen, my time draws to a close. To say anything usefully in a single lecture upon a subject which in Mr. Daniell's book on Chancery practice occupies some 1,500 pages,^(a) is not easy. Some of you, perhaps, may have heard this evening not much more than you already knew ^(a). But in my subsequent lectures I must have assumed some general knowledge on the subject of procedure; and I thought it fair, for the sake of beginners, to allot one lecture to this subject. To have devoted more time would have seriously crippled my opportunities for handling the subject of jurisprudence; and I could not but remember that, while equity jurisprudence must ever be a part of the education of every well-informed lawyer, whether barrister or solicitor, equity procedure must be of comparatively small importance to those of my hearers whose "*habitat*" is not to be the metropolis. In my next lecture, then, I shall resume the subject of equity jurisprudence, treating more particularly of those cases in which the equity courts exercise an exclusive jurisdiction.

(a) The student will find the meagreness of the above general sketch now compensated by the fuller information contained in "Mr. Barber's Statement," reprinted in the Appendix, with the addition of notes and references.

LECTURE IV

THE task to be performed, or at least attempted, by me in this lecture, is to give a "brief review of those heads of equity jurisprudence, in which the court exercises an *exclusive* jurisdiction."

These words are, perhaps, not altogether free from ambiguity, and seem to need some slight elucidation at the outset.

Whenever courts of equity deal with equitable rights wholly unrecognised by courts of law, then, without doubt, the jurisdiction is exclusive.

But there are cases in which, though the *right* is recognised equally by the court of law and by the court of equity, the latter court alone affords an adequate *remedy*; while the class of cases being frequently described by the name of the particular equitable remedy, it might seem at first sight to constitute a head of *exclusive* equitable jurisdiction.

Thus, take "specific performance." To enforce the performance "*in specie*" of certain classes of contracts belongs to courts of equity only. *Specific performance*, therefore, might appear to be a head of *exclusive jurisdiction* in equity. On the other hand, however, it is

perfectly clear, that where a contract has been entered into of a class conferring a right to specific performance in equity, the courts of law recognise the *mere right* to a performance of a contract, just as much as the court of equity. The real difference consists in the remedy applied. The court of law, upon the right being withheld, merely says : “ The contract has been broken, and “ we will give the injured party damages.” The court of equity says : “ The injured party has a right, if he so “ prefer, to treat the contract as subsisting, and to insist “ on its being actually performed.” So far, therefore, as respects *rights* under the contract, the court of equity has *concurrent* jurisdiction only. What it does is, to afford a remedy peculiarly and exclusively its own ; which, in certain cases, is the only satisfactory one.

Assume as an illustration, the ordinary instance of a contract for sale of land and deposit paid by the purchaser. Either the purchaser or the vendor may sue, *either* in equity for specific performance, *or* at law for breach of the contract. To the purchaser who wants the land, an action at law would be useless ; while the remedy in equity is all-sufficient. The vendor, on the other hand, should there be a clause forfeiting the deposit in the events which have happened, may find it to be for his interest to treat the contract as a broken and not a subsisting contract, retaining the deposit as forfeited, and suing at law, if need be, for any damages which he may have sustained by reason of its breach. Thus the jurisdiction, in reference to the contract and to the rights of the parties thereunder, is really *concurrent* only.

It is, perhaps, of no very great importance whether we treat specific performance and analogous heads of equity jurisdiction as falling within the *exclusive* or the *concurrent* jurisdiction of the court, provided our conceptions respecting them be really accurate; but I would state, for the sake of clearness, that I propose including them under the division of *concurrent jurisdiction*. I would add further, that *partition* being historically, though not in fact now, a head of concurrent jurisdiction, it will be treated of under that title.

Excluding, then, the heads of jurisdiction adverted to, the instances in which courts of equity exercise an *exclusive jurisdiction*, strictly speaking, will be found to fall generally within one of the two following branches:—

First—where the courts of equity recognise some right wholly ignored by the common law, such as the rights of parties claiming under deeds or instruments of trust.

Secondly—(and I may observe that this division is far less extensive in its range than the former)—where a special exclusive and *quasi* paternal jurisdiction is exercised for the protection of persons under disability, such as infants and lunatics.

Under the *first* of these branches, we may range the following four subdivisions:—

1. Trusts generally.
2. Administration of estates of testators and intestates.
3. The equitable jurisdiction in reference to the property of married women.

4. The equitable jurisdiction in reference to mortgages, penalties, and forfeitures.

To avoid misconception, let me say that I exclude purposely the jurisdiction of the Court of Chancery in reference to charities, for want of time at least, if not for other reasons.

The first of these four divisions, viz., "*Trusts*," constitutes by itself by far the largest and most important head of equity jurisdiction. Indeed, either to this subdivision or to the second, viz., "*Administration of estates of testators and intestates*," may be referred almost the entirety of the vast administrative business of the Court of Chancery, the distinction between which and the litigious business has been already pointed out or alluded to more than once (a).

But besides being the most important head of equity, it is one of the most ancient; and, acting on the convictions expressed in my first lecture, respecting the importance of a historical treatment of equity jurisprudence, I propose giving a short account of the origin and rise of trusts.

Now, the notion of a use or trust is one with which you are probably so familiar that but little explanation is needed. It involves the supposition of land or other property being legally vested in a feoffee to uses, or trustee, upon confidence that he will deal with it according to the directions of some other person who is beneficially entitled, the *cestui que use* or *cestui que trust*.

In the period preceding the statute of uses, the *modus*

(a) See pages 30, 71, &c., supra.

operandi, in reference to land, was to execute a feoffment to some five or six persons, commonly called *feoffees to uses*. More frequently than not, so far as can be judged from the old cases, there was no written evidence of the uses upon which the feoffees were to hold the lands; indeed, there can be no doubt whatever that, in the early origin of uses and trusts, the conveying party did not suppose he was imposing anything more than a merely honourable obligation upon those whom he *trusted* with his property. This honourable obligation our early ecclesiastical chancellors, blending doubtless to some extent their *functions* as spiritual guides and directors of the community with their *powers* as high State officials, converted, as has been explained, into what is now a recognised equitable liability.

At the present day, when the word "*trust*" has become a term of art, it is difficult to recognise in its now technical meaning the more popular sense in which the word was originally used. We shall find, however, the clearest evidence that a mere confidence in the honour and good faith of the trustee was, *and still is*, sufficient to create a *trust*, if we turn to the class of authorities in which words amounting to no more have been held adequate for that purpose.

The cases on this point, which are *legion*, are well collected in Mr. Lewin's work on the Law of Trusts (a), but two instances will be sufficient for illustration.

(a) Third edition, pages 167, 168. Fourth edition, pages 100, 101. Fifth edition, pages 104, 105.

Thus, in *Parsons v. Baker* (a), a devise to a nephew in fee, “*not doubting*, in case he should have no child, but “that he will dispose and give my said real estate, &c.,” was held to create a technical trust. And in *Macnab v. Whitbread* (b), where the gift was to a person, *in the full assurance and confident hope* that he would make a particular disposition, the present Master of the Rolls expressed his opinion that the words used would have been sufficient to constitute a trust, though for other reasons no trust was established. In fact, if the *subject-matter*, the property, be clearly defined, and the *objects* of bounty clearly pointed out, almost any words of intention are sufficient to create a trust. They may be words which, as in the cases just referred to, leave no doubt whatever on the reader’s mind, that the matter was to be left to the honour of the persons to whom the property is given; and yet there will be a trust. In truth, to exclude the creation of a trust, where subject and objects are alike certain, it is almost necessary that the donor should say, in so many words, that he intends to leave the matter to the *honour* or *discretion* merely of the donee of the property, and *not* to impose any legal or equitable obligation (c).

In reference to the first causes of the introduction of

(a) 18 Vesey, 476.

(b) 17 Beav. 299.

(c) The case of *Huskisson v. Bridge*, 4 De Gex & Smale, 245 (in which a testator, after bequeathing his residuary estate to his wife, and expressing clearly and distinctly his wishes respecting the disposition thereof, concluded by saying that it was not his intention to deprive her of the exercise of the entire right over the property), will be found to afford an apt illustration of the exclusion of a trust, by words evincing an intention *not* to create one. And see *Fox v. Fox*, 27 Beav. 301.

uses and trusts, you are probably aware that the origin of uses is commonly ascribed to the endeavours of the ecclesiastics to evade the statutes of mortmain. It is said that the statutes of Edward I. having forbidden the grant of land to religious houses directly, it was conceived that the law could be evaded by grants to feoffees for the benefit of those houses ; and probably the commonly received opinion is correct. The Statute Book, at all events, contains clear evidence that feoffments to uses were, in point of fact, adopted for the purpose of evading the law in this respect. Thus, by the 15th Ric. II. c. 5, all those who were possessed, by feoffment or by other manner, *to the use* of religious people, of lands, were directed to amortise the said lands (*i. e.* to convey them in mortmain), with the licence of the king, and of the lords of the fee, within a given time, or to convey them away to some other use ; and similar purchases to uses were made void for the future. But although the origin of uses may have been the desire to evade the statutes of mortmain, we must (since by the statute just cited the desire was so early frustrated) seek for other causes to account for the perpetuation of the system of uses. And these may be said to have been mainly four, viz.—

First. By a feoffment to uses, the *cestui que use* acquired a power of devising his lands by will, and of dealing generally with the equitable ownership more easily and more arbitrarily than he could have done with the legal.

Secondly. In the event of his attainder the land was not forfeited, nor did it escheat.

Thirdly. The *cestui que use* escaped the oppressive incidents of feudal tenure.

Fourthly. The *use* was not liable to be extended on an execution.

As to the first cause, you must recollect that, previously to the time of Henry VIII. (a), the legal interest in land could not, except as regarded terms of years, be devised by will. There was in some Boroughs a special power of devising by custom, as was also the case with the lands in Kent; but the quantity of land so devisable was insignificant as compared with the total extent of the kingdom, and may be laid out of account. Hence a man might have large property, far more than enough to provide for two sons, or his eldest son might be a spendthrift, or worse; still, so long as the *legal interest* remained in himself, he had no means of preventing his property from passing at his death to his natural heir. But the court of equity held that, where the legal estate had been conveyed to feoffees, the *use* was devisable; and thus, by putting the land in use, an absolute power of testamentary disposition was acquired.

Again, at the period of which we are now speaking, the legal interest in the land could be conveyed only in a formal notorious manner by *livery of seisin*; that is to say, in the ordinary case the conveying party executed a deed of feoffment, and then openly, on the land itself, delivered seisin to the feoffee, by handing to him a clod, a piece of turf, or a twig, with words showing that the delivery so made was symbolical of the delivery of the whole property. But where the land had been conveyed

(a) See 32 Henry VIII. cap. 1; and 34 Henry VIII. cap. 5.

to uses, the *cestui que use* might deal with the beneficial interest by an entirely secret deed or instrument, without any livery.

Again, the nature of the interests which the common law allowed to be carved out of the legal estate was limited and restricted. Thus a fee could not be mounted upon a fee, nor could an estate of freehold be made to commence at a future time. The owner of the *use* was subject to no such restrictions in dealing with it.

The inducements, therefore, to put lands in "*use*," in order to obtain larger powers of disposition, were immense.

Secondly, the *use* was not, until the reign of Henry VIII., forfeitable for the offence of a *cestui que use*, nor did it escheat in the event of the attainder, though the land itself was liable to be forfeited, or to escheat in the event of the attainder of the *feoffee to uses*. The natural result was, that in troublous times, like those of the last Edward and Henry VII., men who took an active part in political movements naturally vested their lands in feoffees of their own selection, known from their character to be little likely to expose the property to forfeiture or escheat.

Thirdly, by putting the land in use, the burdens of the feudal law were evaded. You will find a most able exposition of the nature and character of these burdens in Sir W. Blackstone's Commentaries (a). It will be sufficient for my purpose if I remind you merely of *wardship* and *marriage*. The former feudal incident entitled the lord, where a tenant holding by knight's

(a) Book II., chapter v.

service died leaving an infant heir, to enter upon the possession of the heir's lands; and, subject to his maintenance, to take the whole rents and profits during minority. The latter incident allowed the lord to sell the right of marrying his ward, subject to the only restriction that the marriage was not to be a disparaging one; and if the ward refused to accept the marriage offered, he was heavily mulcted. Desire of escape from the hardships of feudal tenure would seem almost alone to have been a sufficient reason for resorting to the practices of uses.

Fourthly, where a debtor was legally entitled, the creditor was able to extend, under an *elegit*, a moiety of the land, and take the rents and profits in satisfaction of his debt. He had no such power in regard to the *use*. There was, therefore, the strongest temptation to every fraudulently disposed debtor—a class whom it is too much the fashion to consider as of purely recent origin—to put his land in use.

In the process of explaining to you the principal causes which led to the establishment of the system of uses, I have already pointed out most of the incidents and features of the *use*. Some few remarks may, however, be added.

It has already been mentioned that the use was transferable; and you will have inferred, as of course, that in the absence of any disposition it descended as the legal interest would have done, though it was not held liable to curtesy or dower. Whether the rights of the *cestui que use* were enforceable against the original feoffee only, or also against those deriving legal title under

him, was a point upon which different views were held at different periods of the history of uses, there being a gradual tendency in advancing ages towards more liberal doctrines on this head in favour of the *cestui que use*. In the reign of Edward IV., for instance, it was considered, that if the feoffee to uses died or aliened, the *cestui que use* had no remedy against the heir or the alienee. Thus, in a case reported in the Year Book, 8 Edward IV. folio 6, after a considerable discussion, whether a subpoena would lie against one only of several executors separately (the court held it would not), the case proceeds thus:—"Et fuit move si
 "subpœna gist vers executor ou envers un heir. Et
 "Choke dit que il sua auterfois subpoena vers le heir
 "de son feoffee et le mater fuit longmt debate. Et
 "l'opinion de la Chancerie et les justices que il ne gist
 "pas enys le heire, per que il sua un bill al Parliament," &c. And then Fairfax (one of the justices) says, with characteristic legal relish, "*C'est matter
 "est bon store pur disputer apres quant les auters
 "veingt (a).*"

It is stated in Bacon's Abridgment (b), that the subpoena against the heir was first allowed in Henry VI.'s time; the law on this point being changed by Fortescue, C.J., but no reported case is referred to. We find, however, traces of more liberal doctrines in Keilway's Reports, in the reign of Henry VII. (c), and in a great case in the Year Book, M. T. 14th Henry VIII. (d),

(a) See the same views treated still more clearly as sound law, in a case in the Year Book, 22 Edward IV. fol. 6.

(b) Vol. viii. p. 176; Uses and Trusts (B), 1.

(c) 42 pl. 6, 46 pl. 2.

(d) pl. 5.

although the judges differed in opinion upon other points, they seem to have agreed that, as a general rule, *subpœna* lay against both the heir and the alienee of the feoffee (a).

The use being then such as it has been described to you, and the inducements to put land in use such as have been pointed out, the result was a large and gradually increasing quantity of land held in use ; and the effects of the system have been thus graphically described in an oft-quoted passage of Lord Bacon : “ A man that had cause to sue for his land, knew not against whom to bring his action, nor who was the owner of it. The wife was defrauded of her thirds ; the husband of being tenant by courtesy, the lord of his wardship, relief, heriot, and escheat ; the creditor of his extent for debt ; the poor tenant of his lease (b).”

It was not to be expected that this state of things should be quietly submitted to. Accordingly, on refer-

(a) Part of the reasoning of Fitzherbert for holding the alienee of the feoffee to be bound is so well put and so quaintly illustrated, that I am induced to transcribe it. It is as follows :—“ Car si jeo infeffe B. a aver a luy et ses heirs et assigns ; or mon *trust* et confidence est in lui in ses heirs et assigns ; et ceo est prove bien, car les heirs seront liez de performer l' volonte le feoffer si bien come son pere, et issint le second feffee si bien come le premier, si ne soit consideration, et issint est si les feffees souffrent un recovere sans consideration : car sera entend par Ley en tant or que sans consideration il departe ove l' terre in que il fuit seisi at use, qu'il departe ove ceo in le plus due forme il peut, s. come il ceo avoit adevant. Car ou un act rest in entendment et indifferent la Ley adjudgera le mieux : car si jeo voy un Prestre et une feme insemble suspecioneusement, uncore si longement que il est in doubt que il fait bien on mal, covient entendre le melieur.”

(b) The Use of the Law, Bacon's Works. Edition by R. Montagu, vol. xiii. p. 240.

ence to the Statute Book, we find a continual struggle going on against the system, or rather against its injurious results, which have just been mentioned. The efforts of the Crown and Legislature appear, in the first instance, to have been directed towards fixing the *cestui que use* with all the liabilities of the legal ownership. Thus, various statutes were passed in the reigns of Edward III., Richard II., and Henry VII. (a), rendering the use liable to be extended; and in the first year of the reign of Richard III. the *cestui que use* was empowered to alien the land as against his feoffee (b). In Henry VII.'s reign, the right of wardship was given to the lord over the heir of *cestui que use*, leaving, however, the right of testamentary disposition untouched (c); and by an act of the reign of Henry VIII. the *use* was made forfeitable for treason (d).

But these efforts, though, as the event proved, they were made in the right direction, were insufficient to

(a) 50 Edward III. cap. 6; 2 Richard II. stat. 2, cap. 3; 19 Henry VII. cap. 15. (All repealed by the Statute Law Revision Act, 1863, as having become obsolete or unnecessary.)

(b) 1 Richard III. cap. 1. (Repealed by the Statute Law Revision Act, 1863.)

(c) The epitome of this statute, 4 Henry VII. cap. 17, given in Ruffhead's edition, contains no allusion to this reservation of the testamentary right. In the Edition of Statutes published by the Record Commission, the Act is given at length, and the right of wardship is conferred only in the case of "*no will by him declared nor made in his lyfe touching the premisses or any of theym.*" (The statute was repealed by the Statute Law Revision Act, 1863.)

(d) 26 Henry VIII. cap. 13, s. 5. (Now repealed by the Statute Law Revision Act, 1863, leaving, however, the 33 Henry VIII. cap. 20, s. 2, in force.)

satisfy the Crown ; and towards the latter part of his reign, a new and great attempt was made by Henry VIII. to abolish uses altogether ; and this, by proceeding upon an entirely different plan, viz. by turning the equitable uses into legal estates at law. This was the “modus operandi,” or rather the *intended* “modus operandi,” of the famous Statute of Uses (a). You know how it failed. The courts held, that if a man enfeoffed A and his heirs, *to the use of* B and his heirs, *in trust for* C and his heirs ; the statute turned the first use, viz. that in favour of B, into a legal estate, leaving B a trustee for C. Thus, two unexpected results flowed from the statute, viz. :—

1. Facilities were afforded for creating through the medium of it a variety of legal estates unknown to the common law.

2. The system of uses revived, with a new and more healthful vigour, under the name of trusts. I say revived with new and more healthful vigour, because, although it was held that the various statutes enacted respecting the use anterior to the Statute of Uses itself did not apply to the trust ; yet, partly by judicial decision and partly by statutory enactment, the trust was gradually, though not without a struggle, by the end of the reign of Charles II. placed upon a similar, though more liberal and more satisfactory footing than the old use. Thus the trust descended like the legal interest, and was alienable, though, by a wise provision of the Statute of Frauds (b), not without writing. The heir or alienee might sue for its performance. It was sub-

(a) 27 Henry VIII. cap. 10.

(b) 29 Car. II. cap. 3, s. 9.

ject to curtesy ; and, by the Statute of Frauds, was made liable to execution (a). The trustee and his heir or alienee (except an alienee without notice of the trust) were alike subject to be sued in equity ; and even the widow of the trustee, who became legally entitled to dower, and the husband of the female trustee, in respect of his legal estate by the curtesy, were held bound to perform the trust. The only anomaly of importance was the exception lately removed (b), viz. :—that the equitable estate conferred no right of dower on the wife of the equitable owner.

I proceed now to the second subdivision under my first head, viz. :—“Administration of estates of testators “ and intestates.”

It is by no means clear that the jurisdiction of equity courts under this head might not properly be ranged under the general head of Trust, so far at least as it is really *exclusive* ; but it is more convenient to treat it separately.

Administration suits may be said to be of three kinds:

First. Creditors' suits.

Secondly. Legatees' suits.

Thirdly. Suits by parties interested in the residuary real and personal estate.

Now, the first class of suits cannot be said to be necessarily, and to all intents, suits for administration. The creditor has merely a right to be paid his debt. He may sue, according to the nature of his claim, the executor, heir or devisee, at law ; and, upon his esta-

(a) 29 Car. II. cap. 3.

(b) i.e. by the Dower Act of 1833, 3 & 4 Will. IV. cap. 105.

blishing his debt, recover against them to the extent of the assets with which they are chargeable. Except in reference to certain kinds of property, which courts of equity held to be assets, but courts of law did not ; and except when the creditor comes to the court of equity on the footing of a *cestui que trust*, his rights in equity are no higher than at law. The frame of his bill is for payment of his debt, *if* the defendant, the executor or trustee, admits assets ; *if not*, then for an account, and for payment of his debt in due course of administration. If the executor or trustee choose to admit assets, or to submit to a decree, the creditor gets what he is entitled to, and no administration takes place. Practically, however, this is a case of rare occurrence. The executor does *not* admit assets. The creditor establishes his debt at the hearing, the accounts are taken, and, if the assets be sufficient, the creditors are paid in full : if insufficient, they are paid rateably, having regard to their priorities (*a*). The surplus, if any, is administered according to the rights of the parties who come next after the creditors ; and thus, *practically*, the creditor's suit is a suit for *administration*.

It is not easy to trace when the right of the creditor to file a bill in equity was first clearly established. The earliest cases were doubtless those, in which from the nature of the property to be administered or from other circumstances, no relief could be had at law. One of the earliest reported cases is to be found in the

(*a*) By 32 & 33 Vict. cap. 46, specialty and simple contract debts of persons dying after Jan. 1st, 1870, stand in equal degree.

Introduction to the "Proceedings in Chancery," already frequently referred to. The plaintiffs were the executors of one Vavasour; the defendants, the executors of the Bishop of Lincoln. The bill alleges that the testator, without any writing or specialty, of very trust, lent a thousand marks to the Bishop of Lincoln; and that the plaintiffs had no remedy by the common law (*a*).

Another early case, though of far more recent date, is to be found in Cary's Reports (*b*). There the testator mortgaged his copyhold, and then devised the equity of redemption to be sold for payment of debts. The bill was, in substance, a suit for redemption and payment out of the proceeds of sale of the copyhold.

At a later time, though when exactly it is difficult to determine, the right of the creditor to file his bill in equity (even though the assets to be administered might be legal assets only and the right to sue at law clear) became firmly established, and so remains at the present day.

We proceed to the second kind of administration suits, viz. Legatees' suits.

So late as the end of Queen Elizabeth's reign, it appears to have been at least doubtful, whether the only remedy of a legatee, seeking payment of his legacy from an executor, was not in the Ecclesiastical Court. Thus, in the little book by Tothill, called "Transactions of the High Court of Chancery," consisting, for the most part, of brief notes of decided cases, we

(*a*) See Calendars of Proceedings in Chancery, vol. i. xciii.

(*b*) Page 9, edition 1820.

find the following decision noted. “*Piggot contra Parson*:” (44 Eliz.) “Because the ground of the bill is for a legacy thought fit to be dismissed (a).” On the other hand, in the same book, under the head “Legacy,” various cases are referred to, in which the jurisdiction appears to have been exercised, and one of them (b) of eight years’ earlier date than the decision just cited.

The growth of the Chancery jurisdiction in respect of legacies is clearly traceable to the imperfections of the jurisdiction of the Ecclesiastical Courts. The latter, being a mere jurisdiction to decree payment of the legacy, was in a large number of cases unable to do justice. When the testator’s assets were clearly sufficient, no difficulty arose; but when the debts were considerable, or there was reason to apprehend the existence of undiscovered liabilities, the arm of the Ecclesiastical Court was for all useful purposes paralysed. It had no power to make provision for the payment of debts: and if it decreed payment of the legacy simply, the executor might subsequently, upon the assets proving insufficient for payment of both debts and legacies, have to make good out of his own means that portion of the assets which he had, in obedience to the decree of the Ecclesiastical Court, applied in payment of the legacy.

Probably the earliest cases in which the legatee came to the Court of Chancery seeking payment of his legacy, were those in which he did so strictly in the character of *cestui que trust*, as where real

(a) Tothill, p. 19.

(b) *Yelverton contra Newport*, 36 Eliz.

estate had been devised for payment of debts and legacies.

Subsequently, we find cases in which the executor, being sued in the Ecclesiastical Court, filed his bill in the Court of Chancery, asking to be indemnified against payment. *Horrell v. Waldrup*, decided in 1681, was a case of this kind (a).

But the moment the Court of Chancery allowed the executor to insist upon the payment to the legatee being made under its own protection, it was matter of course that it should allow to the legatee the reciprocal benefit of suing the executor. Thus, suits by legatees became part of the established jurisdiction of the court, and so they remain at the present day.

The legatee, like the creditor, merely asks by his suit payment of what is due to him; and if the executor should choose to admit moneys in his hands applicable for payment, the suit may be at an end without more. But practically, a legatee's suit is, except in rare instances, a suit for administration. The executor is, from particular circumstances, unable

(a) The following is the material portion of the Report: "The plaintiff was sued in the Ecclesiastical Court for legacies, and preferred his bill here to be indemnified in the payment of them; and the defendant demurred, because the conusance of legacies belongs to the Ecclesiastical Court, and they will take care to indemnify the party in payment of them."

"But the demurrer was overruled, because this Court hath the proper conusance of legacies, and in some cases, this court will take care for indemnifying the executor or administrator, where the Ecclesiastical Court cannot, and will make a legatee refund, if debts appear afterwards, if the legacy be decreed by this court; and this court will give interest for a legacy, which that court doth not, and the plaintiff hath an election to sue here or there." (See 2 Freeman, 83.)

or unwilling to admit assets. The legatee, of course, cannot be paid without prior payment of debts. Hence, the accounts have to be taken and the debts to be paid; and when the cause has reached that stage at which the pecuniary legatee is entitled to payment, the distribution, under the direction of the court, of the net residue amongst the persons entitled thereto, follows as of course. Thus, what is primarily a mere bill for a pecuniary demand, is in substance a bill drawing with it a general administration.

The third kind of administration suit, viz., that in which the plaintiff is a party interested in the residuary real or personal estate, demands but little explanation.

Here, the party seeking relief of the court comes really in the character of *cestui que trust*, asking to have the accounts taken, the estate cleared by payment of the testator's debts and legacies, the net residue ascertained, and the plaintiff's share paid to him, or, if the plaintiff be under disability (say an infant), secured for his benefit.

Finally, I would observe, that in each of these three kinds of suit, the jurisdiction exercised, so far as it amounts to *administration*, is really *exclusive*. It is in a court of equity alone that the executor's accounts can be taken, the claims on the estate satisfied, and the net surplus ascertained and handed over to the proper parties; and, though the classification may not be in all points perfect, "*Administration of Estates of Testators and Intestates*" properly falls under the division of *exclusive jurisdiction*.

To proceed to my third subdivision, viz., “Equitable
“Doctrines in reference to the Property of Married
“Women.”

Upon the question whether the Court of Chancery can be said to exercise any protective jurisdiction over married women in the same way that it does over *infants*, I shall say a few words presently, when I reach my second main branch of exclusive jurisdiction. For the present, I limit myself exclusively to the question of *property*.

Consider first the position of a married woman *at law* in reference to property. The husband upon marriage becomes absolutely entitled to all his wife's personal estate, and to an estate during the joint lives of himself and his wife in her freehold property. This last estate becomes enlarged into an estate for his own life (the estate by the curtesy) immediately upon the birth of issue of the marriage. The *law* (a) annexes, in reference to the husband's title to the wife's personal estate, one qualification for the benefit of the latter, viz., that if the husband does not reduce the personalty into possession during the coverture, and the wife survives, the wife retains, by right of survivorship, so much of her personal estate as has not been so reduced into possession. The *law* also, in its result, enforces one disability for the benefit of the wife, viz., that she shall not alien her real estate except upon the terms of her being separately examined, and (after the effect of the intended alienation has been explained to her) giving her personal assurance that the alienation

(a) *i e.*, law as distinguished from equity.

is of her own free will. Thus stands the matter at law (a). In equity the privilege and protective disabilities of the wife are more extended.

(a) The legal position of married women has been materially modified by the "Married Women's Property Act, 1870," 33 & 34 Vict. cap. 93, of which the following is an abstract.

- § 1. The earnings of married women are to be deemed property held to their separate use.
- § 2. The same as respects deposits in savings banks.
- § 3. Married women may hold public stock in their own names as if settled to their separate use, and deal with the same as if they were unmarried.
- § 4. The same as to shares, debentures, or stock in joint stock companies, to the holding of which no liability attaches.
- § 5. The same as to interests in friendly, benefit, and other similar societies.
- § 7. Personal property coming to a woman *married after the passing of this Act*, during her marriage, as next of kin, and any sum not exceeding 200*l.* coming to any such woman during marriage under a deed or will, to belong to her for her separate use, and her receipts alone to be good discharges.
- § 8. The same as to rents and profits of freehold, copyhold, or customary hold property, which shall descend upon a woman so married.
- § 9. Contains special provisions for the decision of questions of ownership as between husband and wife.
- § 10. Enables a married woman to effect policy of assurance on her own or her husband's life for her separate use, and contains other provisions as to policies.
- § 11, is as follows : "A married woman may maintain an action
 "in her own name for the recovery of any wages,
 "earnings, money, and property by this Act declared
 "to be her separate property, or of any property
 "belonging to her before marriage, and which her husband shall by writing under his hand have agreed
 "with her shall belong to her after marriage as her
 "separate property, and she shall have in her own
 "name the same remedies, both civil and criminal,
 "against all persons whomsoever for the protection and

They are mainly three :—

1. The capacity of the wife to hold property as a *feme sole* ; to have a *separate estate*, in fact.

2. The wife's *equity to a settlement* out of equitable interests.

3. The wife's *disability* in reference to her right of survivorship in equitable interests.

The first of these three heads, viz., the wife's separate estate, has been selected for particular considera-

“ security of such wages, earnings, money, and property,
 “ and of any chattels or other property purchased or
 “ obtained by means thereof for her own use, as if
 “ such wages, earnings, money, chattels, and property
 “ belonged to her as an unmarried woman, and in any
 “ indictment or other proceeding it shall be sufficient
 “ to allege such wages, earnings, money, chattels, and
 “ property to be her property.”

§ 12, is as follows : “ A husband shall not by reason of any
 “ marriage which shall take place after this Act has
 “ come into operation be liable for the debts of his wife
 “ contracted before marriage, but the wife shall be liable
 “ to be sued for, and any property belonging to her
 “ for her separate use shall be liable to satisfy such
 “ debts as if she had continued unmarried.”

§ 13. A married woman having separate property is made liable to the parish for the maintenance of her husband.

§ 14. The same as respects her children.

Of the foregoing provisions, the 7th, 8th, and 12th sections apply only to women married after the 9th August, 1870, the rest are general.

The chief novelty is to be found in the 11th section, which may be considered as giving the wife, so far as respects her statutory separate estate, a right of action at law in her own name, and of suit in equity (without a next friend), and that without sufficiently providing for the costs of defendants against whom ill-founded claims may be brought.

In a recent suit in equity by a married woman (without a next friend) against execution creditors and the sheriff, the Court required the married woman to give, as the price of an injunction, a charge on her separate estate to secure costs.

tion in my seventh lecture. For the present, therefore, I shall only say that in a court of equity a married woman may, in reference to property, be placed in the position of a *feme sole*.

I pass, then, to the wife's *equity to a settlement*.

Where a husband becomes entitled, in right of his wife, in possession, to property which he is unable to recover at law (say a legacy left to his wife by the will of a testator, or a share of personalty to which his wife has become entitled under a settlement), although *primâ facie* the husband is entitled to receive the property, so that, upon the executor or trustee paying him the wife's legacy or share of personalty, the husband's receipt would be a good discharge (a); yet, if the intervention of a court of equity be in any way called into action, the court allows the husband to receive the property, subject only to what is called the wife's right or equity to a settlement; that is to say, unless the wife expressly waives this right or equity, the court will inquire into all the circumstances connected with the marriage (*e.g.*, whether the husband has made a settlement on his wife; how much of her property he has already received: what is his pecuniary position; whether the husband and wife are living together or apart), and will, upon a consideration of all the material facts, decide how much of the property (if any) shall be paid to the husband,

(a) The law is now (by section 7 of the recent Act) altered as to women married after August 9, 1870, except where property exceeding 200*l.* is acquired under a deed or will. Where the property so acquired exceeds 200*l.*, or the marriage is of earlier date, the law remains unchanged.

and how much (if any) shall be settled on the wife (a).

There can be little doubt, I think, from the name given to this privilege, and from the earliest notices of it which occur, that it originated in those cases where the executor or trustee, declining to pay to the husband, the latter filed his bill in Chancery. Thereupon the court said, "You, the husband, who seek equity, must do equity; and we will not decree payment of any part to you except upon the terms of your settling upon your wife and her children, if she so desire, a fair share of the property acquired by you through her."

It is, however, certain that the wife's right is, at the present day, far more extensive than the suggested historical origin would logically warrant. Thus, it may extend to the *whole fund* (b), and therefore could not now be regarded as the price paid by the husband for the court's interference in his favour; not to mention that it is now clearly settled that the equity is one which the wife may herself assert actively either by bill (c), or by petition (d).

(a) The cases are too numerous for detailed reference. Amongst the more instructive are *Gardner v. Marshall*, 14 Simons, 575; *Vaughan v. Buck*, 1 Simons, N.S. 284; *Bagshaw v. Winter*, 5 De Gex & Smale, 466; *Dunkley v. Dunkley*, 2 De Gex, Macn. & Gor. 390.

(b) *Dunkley v. Dunkley*, 2 De Gex, Macn. & Gor. 390; and numerous other cases; collected, *Lewin on Trusts*, 4th edition, p. 482, note (e), 5th edition, p. 530, note (h).

(c) See *Lady Elibank v. Montolieu*, 5 Vesey, 737; *Duncombe v. Greenacre*, 28 Beavan, 472; 2 De Gex, Fisher, & Jones, 509.

(d) See *Greedy v. Lavender*, 13 Beavan, 62; also *Scott v. Spashett*, 3 Macn. & Gor. 599.

Next, as regards the wife's right of survivorship in equitable interests. Here, in the main, equity follows the law. If the husband can contrive to reduce the equitable interest into possession, the wife's right by survivorship is gone: if otherwise, it remains. The result, subject to the enactments of the Act of last session (a), to which I will presently allude, is, that when the wife becomes entitled to an equitable reversionary interest in personalty, her right by survivorship cannot, so long as the interest remains reversionary, be barred. In other words, the wife's reversionary equitable interest is, save where the statute applies, inalienable as against her right by survivorship. The husband can confer a title only as against himself in the event of his surviving.

So soon as the doctrines of equity on this point were settled, which it may be said they were finally by the great case of *Purdew v. Jackson* (b), a period of continued attempts to evade the effects of the doctrine followed. Thus, where the wife's interest was reversionary, the husband bought the life estate, procured an assignment of it to the wife, and then sought to treat the wife's interest as immediate, and capable, therefore, of being reduced into possession. It may be said, briefly, that all devices of this description received their deathblow by the decision in *Whittle v. Henning* (c).

Whether the inconvenience created by the joint operation of *Purdew v. Jackson* and of this decision, in rendering certain descriptions of property practically

(a) The Session of 1857. (b) 1 Russell, 1. (c) 2 Phillips, 731.

inalienable, did or did not outweigh the advantage of securing to the wife one species, at least, of possession which the husband, to adopt an expressive phrase, could not even beat out of her, has been much debated. The Legislature has, however, lately decided in favour of freeing this description of property from the fetters thus imposed upon its alienation. In the last session of Parliament an Act (a) was passed enabling married women to dispose of their reversionary interests in personal estate.

The provisions of this Act are shortly as follows :—

By section 1, married women may by deed dispose of reversionary interests in personal estate acquired under any instrument made after the 31st day of December, 1857.

By section 2, it is provided that the deed to be executed by the married woman shall be acknowledged by her in the mode prescribed by the Act for the Abolition of Fines and Recoveries, thus securing to her the benefit of a separate examination.

By section 3, the powers of disposition given by the Act are not to interfere with any other powers.

By section 4, interests acquired by married women, under their marriage settlements, are excepted from the operation of the Act.

It is obvious, that as the Act extends only to interests acquired by married women under instruments made subsequently to December 31, 1857, its operation must, for some time at least, be very limited.

Before parting with this subdivision of my subject, let

(a) 20 & 21 Vict. cap. 57 ; known as Malins' Act.

me warn you against confounding the two questions, of the wife's right by survivorship and the wife's equity to a settlement. It is by no means uncommon to find considerable confusion of ideas in this respect.

The wife's *equity to a settlement* arises only when the fund is ready to be reduced into possession. It may be waived by the wife. This, where the fund is within the control of the court, is commonly done by the wife attending before the judge in open court, when she steps up to the bench, the judge satisfies himself, by a few words of conversation, that the wife understands what is about to be done, and is willing that her husband should have the fund, and thereupon, as the phrase is, "*takes her consent*" (a). If the wife cannot attend in court, her consent may be taken by commission; and I may observe, that in reference to interests acquired under instruments made after the 31st of December, 1857, the wife may, by deed acknowledged, release her equity to a settlement.

On the other hand, the *right by survivorship* is one of which, except so far as the Act of 1857 applies, the wife

(a) When the fund to be dealt with is under 200*l.*, the court was in the habit of paying the fund to the husband, without requiring the consent of the wife to be evidenced in this formal manner. The selection of 200*l.* as the limit within which the operation of section 7 of the Act of 1870 is (as to money coming under a deed or will) confined, was doubtless determined by this circumstance. Where section 7 of the Act applies, the payment must now be to her on her separate receipt. Where the marriage is prior to the Act, the old practice must prevail, but the wife will still have, as she always had, an equity to a settlement, however small the sum may be, which if she assert, instead of remaining merely passive, the court will give effect to—*Re Kincaid*, 1 Drewry, 326.

cannot deprive herself by any act during the coverture; and any device by the husband for the purpose of accelerating the period of possession is, as we have seen, treated by the court as a fraud on the wife's rights, and wholly ineffectual.

In concluding this my third subdivision, it will be well to notice, that both the capacity to have a separate estate, which I have not touched upon, and the peculiar rights of married women embodied in the special equitable doctrines, which I have attempted to explain, are equally ignored by courts of law (*a*), and that the jurisdiction of equity in this respect is strictly a head of *exclusive jurisdiction*.

My fourth subdivision, that of "Mortgages, Penalties, and Forfeitures," alone remains. Time forbids anything beyond mere general observations on this head of equity; and as respects general observations, I can add but little to what I said on this head in my first lecture (*b*).

In a mortgage, the estate is conveyed to the mortgagee, subject to a proviso for reconveyance upon payment of a sum of money on a day named. The money is not paid. At law the mortgagor has then no longer any right. In equity, however, it is held he has still a right to redeem. Again, where a bond was given, in a certain *penalty*, to secure the payment of a smaller sum on a day fixed, and the sum was not paid, at

(*a*) See now the Married Women's Property Act, 1870, of which a summary is given at pages 119, 120, *ante*.

(*b*) Pp. 21—23, *supra*.

common law the obligee was entitled to the whole amount of the penalty; though, as you know, not in equity. Again, a lease is made, reserving a certain rent, and a right of re-entry is given to the lessor if the rent be not paid punctually within a certain time after the day stipulated. It is not paid. The lessor proceeds to eject the lessee. The latter files his bill, tendering the rent, interest, and costs, and the court relieves the lessee on those terms.

In my first lecture I pointed out to you the great difficulty of justifying logically the exercise of this head of jurisdiction, in *its origin* (a). The tendency of later times, however, has been to incorporate into the *common law*, either by statute or decision, the equitable doctrines on these subjects.

Thus, as respects mortgages. No one thing can be more purely the creature of the courts of equity than the equity of redemption, or right to redeem. Yet we find it, by a statutory enactment of the reign of George II. (b), made a subject of common law jurisdiction. By this Act, when an action by mortgagee against mortgagor is pending at common law, either for recovery of the mortgage-money or for ejectment, the mortgagor may bring his principal and interest into court, and the common law court has power to compel a re-conveyance; and thus, under this Act, the common law courts may, and occasionally do, in substance decree a redemption. I cannot say that the statute is often called into operation. It only applies, in truth, where nothing is to be done but to compute the principal and interest due. I

(a) p. 22, *supra*.

(b) 7 George II. cap. 20.

have, however, in practice known one instance of its being resorted to (a).

Again, as respects penalties, the statute 8 & 9 William III., c. 11, providing, in the case of bonds given for securing the due performance of covenants, a special machinery for ascertaining the damage actually sustained by reason of any breach or breaches, and for allowing the judgment for the amount of the penalty of the bond to remain as security against any future breach, is well known. So is the provision in the 4th & 5th Anne, c. 16 (b), which allowed the obligor in a simple money bond to pay into court, after breach, the principal and interest due, and all costs, in full satisfaction of the penalty of the bond, which at common law was absolutely due.

But, further, the mode in which the common law courts have, in recent times, embodied in their own decisions the equitable doctrines on this head, is extremely remarkable.

I refer to the class of decisions establishing the distinction between penalty and liquidated damages, of which *Kemble v. Farren* (c), may be regarded as the leading case. Thus, where the parties to a contract agree, that in the event of a breach of some or one of its stipulations, the party guilty of such breach shall pay to the other a given sum, the court looks at the

. (a) See, as to the kind of notice requisite to oust the statutory jurisdiction, *Doe v. Louch*, 14 Jurist, 853; and see, too, ss. 219, 220, of the Common Law Procedure Act, 1852; the object of which enactments probably was to obviate any questions respecting the applicability of the 7th George II. to the new action of ejectment.

(b) Sect. 13.

(c) 6 Bingham, 141.

whole agreement for the purpose of ascertaining whether the fixed sum appears to be intended as a penalty, or as fixed or liquidated damages. If the former, then the plaintiff may, in respect of the breach, recover only the damages actually sustained by him, as assessed by the jury. If the latter, the liquidated sum itself is recoverable. In the leading case just mentioned, there was a distinct stipulation that the sum named, £1,000, should be *liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof*; and yet the court, looking at all the circumstances of the agreement, held the sum named to be a penalty (a).

It only remains that I should observe, that the modifications introduced into the common law, both by statute and decision, though practically giving to the common law a qualified jurisdiction in reference to this last subdivision of our subject, have appeared to me too limited in extent to form any substantial objection to including "mortgages, penalties, and forfeitures" amongst the heads of "*exclusive jurisdiction*."

My first main branch of exclusive jurisdiction is now ended; and I proceed to the second, which embraces those cases in which a *quasi*-paternal jurisdiction is exercised by the Court of Chancery, for the protection of persons under disability.

Persons not "*sui juris*" may be ranged under one of the three classes of *married women, lunatics, and infants*.

(a) The whole law on the point will be found well collected in Chitty on Contracts not under Seal, chapter vi.

As respects *married women*, it is difficult to say that courts of equity exercise any jurisdiction of a strictly protective character over them. There exists, no doubt, a jurisdiction under which, upon the wife suing out what is called a *writ of supplicavit*, the Court of Chancery may afford her the same kind of relief as would be afforded in a common law court, upon her exhibiting "Articles of the Peace" against her husband. But this jurisdiction, now practically obsolete, is not confined to married women, but may be exercised in favour of any person, "*sui juris*" or not. Again, in reference to those personal rights of the married woman against her husband, which flow more particularly from the marriage contract; the remedy of the wife has hitherto always lain in the Ecclesiastical Court, and will, upon the Divorce and Marriage Act of last session (*a*) coming into operation, lie in the "Court for Divorce and Matrimonial Causes."

Respecting *lunatics*, I abstain from saying anything now, as the jurisdiction in lunacy is of a special nature, and will receive a separate consideration (*b*).

The protective jurisdiction of the court over *infants* alone remains.

How far this jurisdiction was or was not legitimately assumed by the chancellor, has been hotly debated. Mr. Hargrave, in his well-known note to Coke Littleton (*c*), under the head "guardian by the appointment of the chancellor," maintained strenuously that the jurisdiction

(*a*) 20 & 21 Vict. cap. 85.

(*b*) The course embraced one lecture on lunacy, which is excluded from this series, for reasons of little interest to the reader.

(*c*) 88 b. note 70.

was simply usurped. Mr. Fonblanque, on the other hand, in a note of almost equal celebrity appended to the "Treatise on Equity (a)," refers the general superintendence and protective jurisdiction of the court in the case of infants, to a delegation of the duty of the Crown as "*parens patriæ*." The controversy is, however, not as to the existence or limits of the jurisdiction, but merely as to its origin.

I am compelled to condense into few words the practical results in reference to the protective jurisdiction of the court over infants.

The first observation is, that the possession of property by the infant is not actually necessary to sustain the jurisdiction, though, without property, it cannot usefully be called into exercise. The remarks of Lord Eldon on this point, in the great case relating to the custody of Mr. Long Wellesley's children (b), reported at the original hearing before him, should be read with the greatest care.

Secondly, where the property was small, the court was in the habit of exercising its jurisdiction to appoint a guardian, and direct maintenance upon *petition*, without bill filed; and this jurisdiction it now, under the new practice, exercises at chambers, upon summons (c).

(a) Book II. part ii. ch. ii. s. 1, note (a).

(b) *Wellesley v. Duke of Beaufort*, 2 Russell, 1; see pp. 20, 21. It is a common practice, when it is desired to make an infant a ward of court, to vest some small sum, say 100*l.*, in a trustee for the benefit of the infant, and then to file a bill in the name of the infant against the trustee. See the practice noticed in *Gurney v. Gurney*, 1 Hemming & Miller, 419, 420.

(c) See Mr. Barber's Statement, Appendix, p. xxxix.

Thirdly, the power of the court was paramount even to that of the father; the court taking upon itself to deprive even the father of the custody of his child, whenever the father's conduct rendered it desirable for the best interests of the infant that that step should be taken. This was the great point decided in the case of Mr. Long Wellesley's children. The observations of Lord Redesdale in this case, when on appeal before the House of Lords, cannot be too carefully studied (*a*).

Fourthly, the power of the court being paramount to even that of the father, *à fortiori* it is so to that of all guardians, including testamentary guardians, appointed by the father's will under the statute of Charles II. (*b*).

With these extremely meagre observations on a subject which, by itself, would afford matter for an extensive treatise, I must conclude my notice of the exclusive jurisdiction of the court.

(*a*) Reported on appeal, *Wellesley v. Wellesley*, 2 Bligh, N.S. Subject only to the power of the court, that of the father was at the time of this decision absolute even as against the mother, and however young the child. Since then, by 2 & 3 Vict. cap. 54, commonly referred to as Talfourd's Act, the Court of Chancery, upon the petition of the mother, may make in her favour an order for access to her infant child, and if the child be under seven years old, may commit the custody to her until that age.

(*b*) *i.e.*, 12 Car. ii. cap. 24, s. 8.

LECTURE V.

IN reviewing the concurrent jurisdiction of the Court of Chancery, I propose adopting the following arrangement :—

First, I shall submit some general observations in reference to the sources of equity jurisdiction, known as *Fraud*, *Accident*, and *Mistake*, pointing out how far they contribute to the concurrent jurisdiction of the court ; and—

Secondly, I shall touch, *seriatim*, upon the more important heads of concurrent equity jurisdiction, which, while subsisting independently altogether of the general sources just referred to, will be found, in most cases, to owe their origin and vitality to the superior efficacy of the remedy administered by the Court of Chancery.

Now, as respects the first part of my task, I would observe, that any one of the three ingredients, *fraud*, *accident*, or *mistake*, may occur in any kind of suit ; in a suit relating to equitable interests or estates, over which the Court of Equity has *exclusive* jurisdiction, just as in a suit in which the interests involved are purely legal, and the jurisdiction *concurrent* only. In the former case, however, the jurisdiction in equity

being already established on distinct grounds, the precise influence of the particular ingredient of "*fraud*," "*accident*," or "*mistake*," in attracting the interposition of equity, is comparatively little noticeable. In the latter, where it is the very foundation of the jurisdiction, its exact effect and weight can be traced and estimated.

This, I conceive, is the reason why we find *fraud*, *accident*, and *mistake* commonly discussed under the head of *concurrent* jurisdiction.

Now, going back to the earliest discussions respecting the interposition of equity, we find it repeatedly stated, that "covin, accident, and breach of confidence" are the proper subjects of equity jurisdiction (*a*). There was a doggerel rhyme in vogue expressing the legal views on the subject:—

" Three things are judged in court of conscience :
Covin, accident, and breach of confidence."

The last of these three, breach of confidence, we have already, as you know, considered under the head of "trusts," the modern equivalent for the word "*covin*" is "*fraud*." And *fraud* we now proceed to consider, together with *accident* (also referred to by Lord Coke) and *mistake*, which, to the best of my belief, is not mentioned as a head of equity, either by him or by any other text writer of ancient date.

Taking, then, *fraud*, *accident*, and *mistake* in the order mentioned, it is first to be observed that, when discussing "*fraud*" under the head of *concurrent* equity jurisdiction, we have, in strictness, no concern with

(*a*) See 4 Inst. p. 84.

those cases of constructive fraud, which rest upon doctrines forming part of almost every system of civilised jurisprudence, but yet ignored by the common law of England: I mean the doctrines, according to which a special disability is imposed, in reference to the dealings, whether in the nature of contract or of gift, of persons standing towards one another in certain confidential relations; such as *solicitor* and *client*, *guardian* and *ward*, *trustee* and *cestui que trust*.

Thus, by the Roman law, the tutor (or guardian) was prohibited from purchasing the property of his pupil (or ward), and a similar rule was applied to those standing in a similar fiduciary position (*a*).

So by the Code Napoleon the tutor (or guardian) is prohibited from either buying or taking a lease of his ward's property, without special authorization given by what is called the "conseil de famille," the family council, composed of the near relatives of the ward (*b*).

Our own equitable rule on the subject, in reference to gifts, was, in a case frequently quoted, thus referred to by Lord Eldon: "This case proves the wisdom of the court, in saying that it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand, pur-

(*a*) Tutor rem pupilli emere non potest, idemque porrigendum est ad similia: id est, ad curatores, procuratores, et qui aliena negotia gerunt.—Digest xviii. tit. 1, l. 34, s. 7.

(*b*) Code Civil, 450.

“porting to be bounty for the execution of an antecedent duty.” (a).

Laying out of account, then, these cases of “constructive fraud,” or “fraud in equity,” we proceed to consider the equity jurisdiction in cases of fraud, in its popular or ordinary sense of imposition or circumvention; cases, in fact, falling within the old legal term “covin,” and which, in the modern text-books, such as Story’s Equity Jurisprudence, you will find ranged under the head of “*actual fraud*” (b).

Now, in these cases of actual fraud, the jurisdiction of equity was, in the main, strictly *concurrent*. The court of law took cognisance of the fraud, both as ground for a right of action and as a ground of defence. Thus, where money had been obtained through fraud, an action on the case lay for its recovery back; and to any action brought upon an instrument obtained by fraud, a plea of fraud in obtaining it was a good defence.

The equity jurisdiction, however, possessed many advantages over the legal. Thus, in most instances of actual fraud, equity possessed the means of compelling the defendant to answer, upon oath, detailed interrogatories respecting all the alleged facts and

(a) *Hatch v. Hatch*, 9 Vesey, 292. As respects the equitable rule in reference to “purchases,” in cases where the relation is that of “solicitor and client,” one of the most valuable judgments is that of Vice-Chancellor Wigram, in *Edwards v. Meyrick*, 2 Hare, 60. As to the distinction between a gift *inter vivos* from a client to his solicitor and a testamentary disposition by the former in favour of the latter, see *Hindson v. Weatherill*, 5 De Gex, Macn. & Gor. 301. The distinction applies *a fortiori* to the relations of guardian and ward, and trustee and *cestui que trust*.

(b) Story, Eq. Jur. vol. i. chapter vi.

circumstances of the fraud, many of which facts and circumstances might be known only to the plaintiff and defendant; and this advantage alone would almost seem sufficient to have attracted into equity almost the entire jurisdiction in reference to fraud, when it is considered that, until within the last few years, neither could the plaintiff be heard as a witness to prove his own case, nor could he compel the defendant to attend and give evidence (a).

Again, where the fraud had resulted in a deed actually executed, conferring some estate or right which might be asserted *in futuro*, what was really wanted was a judgment, directing the deed to be given up to the person defrauded, or ordering it to be cancelled; and this was a species of remedy which the law courts never took upon themselves to administer. You may recollect, perhaps, my pointing out in my first lecture, that the maxim that equity acts "*in personam*" forms one of the distinguishing features of the equitable jurisdiction (b). As an offshoot of this maxim, we find the equity courts, in the early times of Henry VI. and Edward IV., compelling the actor in the fraud to restore the fruits of his fraudulent conduct.

If anything further were needed to establish the superior appropriateness of the equitable jurisdiction over the legal, it would be found in the circumstance, that the Equity Court is able, in conformity with its habitual mode of action, while setting aside and undoing the fraudulent transaction, to qualify the annulling

(a) See this more fully treated in the next lecture, under *Discovery*.

(b) Pp. 23, 24, *supra*.

operation of its own decree in such a manner as may seem just. Thus, in the case of a bill to set aside a conveyance of real estate, as having been obtained by fraudulent representations at a grossly inadequate value—if the court set aside the deed, it will do so only on the terms of repayment of the purchase money and interest.

When we consider then the advantages of the Equity Court, in respect—first, of compelling discovery; secondly, of interfering actively to annul instruments fraudulently obtained; and thirdly, of properly modifying its decrees and adjusting them to the rights of all parties; it can hardly be wondered at that its jurisdiction, though technically *concurrent*, should have become almost *exclusive* in practice.

We pass to the consideration of *Accident*.

There is hardly any head of equity which more completely eludes definition. General principles may, however, be laid down.

And first, it is clear that, in reference to obligations flowing out of contract, *Accident*, using the word in its ordinary sense, constitutes no more in equity than at law any valid excuse for the non-performance of those obligations.

Thus, if I contract to build a house by a given day; and if, after I have proceeded for some time regularly in the performance of my contract, a considerable portion of the materials which have been prepared for enabling me to complete the house is, *by pure accident*, without any default of mine (say, by a fire originating in lightning), destroyed, and that so shortly before

the time fixed for completion that it is impossible to replace the materials, yet this constitutes no case of *accident* relievable in equity.—I contracted simply to build by the time, and must abide by my contract.

In the early history of our equity jurisprudence, a different view, doubtless, prevailed. Lord Coke illustrates “accident” thus: “Accident, as when a servant “of an obligor, mortgagor, &c., is sent to pay the money “*on the day*, and he is robbed, remedy is to be had in “this court against the forfeiture.” (a)

We find, in the Introduction to the Calendars of Proceedings in Chancery (b), an instance in which the jurisdiction of the court appears to have been invoked on grounds of this kind. The plaintiff having entered into a bond, under a heavy penalty, to repair certain river-banks near Stratford-at-Bow within a given time, had been prevented (as he alleged) from completing his contract by sudden and unexpected floods; and the obligee in the bond having thereupon sued him at law for the penalty, the plaintiff brought his bill for relief. The answer of the defendant in equity in substance asserts that the plaintiff might, with due diligence, have completed his contract.

The final result of the suit does not appear; but the bill probably reflects accurately the views of the day respecting equity. However, as we stated above, no

(a) 4th Inst. p. 84. This passage confirms the view put forward in the first lecture, p. 23, *supra*, that in the earliest instances of relief against penalties and forfeitures, the existence of some circumstance of accidental hardship formed a material inducement to the interference of the court.

(b) Vol. i. p. cxlii.

accident of a similar description would, at the present day, afford ground for relief; and if we lay out of consideration the original influence of the ingredient *accident*, in cases of penalties and forfeitures, the only two classes of cases in the equity jurisprudence of the present day which seem to me to be properly referable to the head *Accident*, are:—

First.—The cases in which the equity jurisdiction is exercised in reference to *lost instruments*; as where, upon a bond or negotiable instrument being lost, a court of equity will compel payment of the amount secured, either with or without the execution of a proper instrument of indemnity against the claims of third parties, into whose hands the lost instrument may have fallen (*a*). And,

Secondly.—The cases of equitable relief against the *defective execution of powers*,—a branch of equity far too subtle and intricate to admit of discussion on the present occasion (*b*).

Mistake alone remains.

Mistake may be said to exist in the legal sense, where a person acting upon some erroneous conviction, either of law or of fact, executes some instrument or does some act which, but for that erroneous conviction, he would not have executed or done.

Now, in reference to “*mistake*,” there is one point

(*a*) See the new jurisdiction given to the common law courts, in cases of this kind, by 17 & 18 Vict. cap. 125, s. 87. See also, as to the distinction, in reference to the jurisdiction in equity, between the “loss” and the “destruction” of a negotiable instrument, *Wright v. Lord Maidstone*. 1 Kay & Johnson, 701.

(*b*) Sugden on Powers, vol. ii. chapter 10.

upon which the doctrines of the common law and of equity will be found agreeing in the main both with each other and with the Roman law. It is this,—that while mistake as to law affords no ground for relief, mistake as to fact does. Thus in the Digest, under the title “De juris et facti ignorantia,” we find the law thus laid down: “Regula est, juris quidem ignorantiam “cuique nocere, facti vero ignorantiam non nocere (a).” And the first illustration, given at the commencement of the title, of the distinction between ignorance of law and ignorance of fact may be freely rendered thus:—“If “a man be ignorant of the death of a kinsman whose “property is about to be dealt with, time shall not run “against him: otherwise, if he be aware of the death “and of his own relationship, but ignorant of his consequent rights (b).”

Of the existence of the rule, as part of our common law jurisprudence, the case of *Bilbie v. Lumley* (c) affords an apt instance. There, an underwriter, with knowledge of a fact which would have entitled him to dispute his liability under a policy of marine insurance which he had underwritten, but in ignorance of the legal rights resulting from that fact, paid the amount which he had assured; and subsequently brought an action to recover the money back. The Court of King’s

(a) Digest. xxii. tit. vi. l. 9.

(b) The words of the original are as follows:—“Nam si quis nesciat “decessisse eum, cujus bonorum possessio defertur: non cedit ei tempus. “Sed si sciat quidem defunctum esse cognatum, nesciat autem proximitatis “nomine, bonorum possessionem sibi deferri: aut si, &c.: cedit ei tempus, “quia in jure errat.”

(c) 2 East, 469.

Bench held the action would not lie. Lord Ellenborough asked plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily, and with full knowledge of all the *facts* of the case, he could recover it back again on account of his ignorance of the *law*. No answer was given; and his lordship subsequently said, "Every man must be taken to be cognisant of the law; otherwise, there is no saying to what extent the ignorance might not be carried. It would be urged in almost every case."

This short observation contains, I conceive, the true ground for the distinction between mistake of law and mistake of fact. Probably, in a very large number of transactions there is at best but an imperfect knowledge of the real state of the law; and even where the knowledge really exists, few things could be easier to allege or harder to disprove than legal ignorance. Indeed, if mistake or misapprehension as to matter of law were admitted as a ground for reopening engagements solemnly entered into, it is difficult to see how any engagement could be relied on.

It must however be confessed, that when we proceed to the consideration of the cases in equity respecting "*mistake*," we find occasionally the line of demarcation between mistake of law and mistake of fact less distinctly drawn in equity than either by the Roman or by the common law. This has occurred more particularly in those cases where, under special circumstances, combined with legal ignorance of a very glaring kind, the court has been induced to grant relief, and has

apparently rested its judgment more or less on the mistake or ignorance of law. The oft-mentioned case of *Lansdowne v. Lansdowne* (a) is, perhaps, the fittest representative of this class of cases. There, the plaintiff, who was son of the eldest brother of a deceased intestate, had a dispute with his uncle, a younger brother, respecting the right to inherit the real estate of the deceased. It was agreed to consult a schoolmaster, named Hughes, who, in his turn, resorted for counsel to a book called the "Clerk's Remembrancer," and finding the law as laid down in the book to be, "that land could not ascend, but always descended," he put the best exposition he could on these somewhat ambiguous words, and decided that the younger brother was entitled. Therefore, it was agreed that the son of the elder brother and the younger brother, his uncle, should share the lands, and a bond and conveyances were executed for the purpose of carrying out the agreement. The nephew subsequently filed his bill to be relieved; and Lord King, Chancellor, decreed that the bond and conveyances had been obtained by mistake and *misrepresentation of the law*, and ordered them to be given up to be cancelled. Lord King is reported to have said, in delivering judgment (b), that "That maxim of law, *Ignorantia juris non excusat*, was in regard to the Public, that Ignorance cannot be pleaded in Excuse of Crimes, but did not hold in Civil Cases." This, however, is clearly not law at the present day.

(a) 2 Jacob & Walker, 205; s. c. Moseley's Reports, 364.

(b) Moseley's Reports, 365.

The form of the decree in *Lansdowne v. Lansdowne*, viz., that the deeds should be delivered up, leads me naturally to the consideration of the superior efficacy of the equity jurisdiction in cases of "mistake." Here, as in cases of "fraud," we find the power of ordering the delivering up of the impeached instrument, imparting to the equitable jurisdiction a completeness vainly sought for at law. As respects the other ingredients of superiority which the equitable jurisdiction has been mentioned as possessing in cases of "fraud" over that at law, both of which exist also in cases of "mistake," we may observe, that while, on the one hand, the discovery obtainable through the medium of the equity courts only was, perhaps, of somewhat less importance in cases of "mistake;" so, on the other hand, the power to qualify, mould, and alter, instead of simply annulling and undoing, was, in cases of "mistake," of even greater importance. Take, as a specimen of mistake, the case of instructions given to prepare a settlement of the lands of a lady on the occasion of her marriage. Assume that, under special circumstances, it had been arranged that, after limitations to the lady and her husband for their lives, the property should go to such uses in favour of the children as the wife alone should, by deed or will, appoint; and that, inadvertently, the power of appointment was given to the husband and wife and the survivor, in the usual form. Now, what is wanted is not to *undo* the settlement, but merely to alter it and make it what the parties intended it should be. The deed requires to be "reformed," as the technical phrase is; and of the entire equity

jurisdiction, derivable from the three heads of *fraud*, *accident*, and *mistake*, it would be difficult to name any portion which is more beneficial, or more judiciously exercised, than that of reforming deeds in cases of *mistake*.

Passing from the general subjects of fraud, accident, and mistake, to those heads of equity jurisdiction which admit of a more definite description, in reference either to the subject-matter of the suit or the nature of the remedy, the most satisfactory approach to classification seems to me to be that which I borrow mainly from Mr. Spence's work, viz. :—

First.—Cases in which, but for the interposition of equity, there would in substance be no remedy.

This class will include Partnership.

Secondly.—Cases in which the remedy at law was wholly inappropriate, including,—

1. Recovery of Specific Chattels.
2. Specific Performance.

Thirdly.—Cases in which the remedy at law, though not positively inappropriate, was less easy and convenient than in equity, including,—

1. Account.
2. Dower.
3. Partition.

Commencing with "Partnership," let us consider the position in which partners stand in reference to legal remedies only. Under the old law, an action of account lay by one partner against another. Thus, Coke, in his commentary on Littleton, says,—“As if

“two joynt merchants occupy their stocke goods and
 “merchandizes in common to their common profit,
 “one of them naming himselfe a merchant shall have
 “an account against the other naming him a mer-
 “chant, and shall charge him as, ‘*receptor denari-*
 “*orum ipsius B ex quâcunque causâ & contractu ad*
 “*communem utilitatem ipsorum A & B provenien*’
 “*sicut per legem mercatoriam rationabiliter mon-*
 “*strare poterit.*’ (a).”

But the remedy by action of account has long since
 become practically obsolete (b); and if we except the
 right of a partner, where partnership articles have
 been entered into under seal, of bringing an action of
 covenant against his co-partner for any breach of the
 articles, we may say without any material inaccuracy,
 that no right of action exists at law.

It could indeed not well be otherwise. Assume that
 one partner receives a sum of money, which *primâ*
facie he is bound to pay into the partnership account,
 or of which he ought to pay one-half to his fellow
 partner, and that he omits to do his duty. Then let
 the aggrieved partner sue the defaulter. The answer
 to the action is obvious,—“The rights of the partners
 “*inter se* cannot be fairly ascertained, except by
 “taking the accounts generally; and if an action of
 “this kind is permitted, one partner may be com-
 “pelled to pay to the other what, upon a perfect ad-
 “justment of the relative rights and liabilities, might

(a) Coke Litt. 172.

(b) A short sketch of the common law action of account will be found in Lecture VIII.

“ appear to belong to himself.” Where the partners have, upon a dissolution of partnership, met and adjusted an account (that is to say, actually taken their accounts themselves), then he who appears upon the result of those accounts to be the creditor of the other, may sue for the balance appearing to be due to him : in fact, “ *cessante ratione cessat lex* ;” but otherwise the court of law is powerless.

Let us now shortly state to what extent and in what way the equity courts aid the infirmity of those of the common law in partnership matters.

First.—The equity court will either, upon a dissolution, or with a view to a dissolution, of the partnership, order the necessary accounts to be taken, and give all directions for realising the partnership property; adjusting, at the same time, all questions of right of trading, indemnity to be given by one partner to the other, &c.

Secondly.—It will, at the instance of a partner, decree a dissolution of partnership, where the other partner has, by breach of the partnership articles or other misconduct, disentitled himself to any further continuance of the partnership ; or when, through permanent ill-health or lunacy, he has become incapable of fulfilling his duties as partner (*a*).

Thirdly.—It will, in case of necessity, *with a view to dissolution*, assume indirectly the management of the concern by appointing a receiver ; but it is now settled

(*a*) As to dissolution in event of lunacy of a partner, see *Besch v. Frolich*, 1 Phillips, 172 ; Anonymous case, 2 Kay & Johnson, 441 ; and *Leaf v. Coles*, 1 De Gex, Macn. & Gor. 171.

that it will not do this when a continuance of the partnership is contemplated (a).

Fourthly.—It will in certain cases direct accounts to be taken, even though a dissolution be not in contemplation (b).

When we compare these large remedial operations of the equity courts with the almost entire powerlessness of the common law, we might be almost tempted to speak of the equity jurisdiction in partnership matters as really *exclusive*.

We proceed to our second class,—in which, though the common law afforded somewhat more of remedy than in that just considered, yet the remedy itself was very inadequate.

And first, as respects the delivering up of “ Specific Chattels.”

At law, if any article or chattel was wrongfully withheld from a man, his remedy was either by action of *trover*, or action of *detinue*. In the former case, he recovered the damages only. In the latter, the jury found the value of the chattels, and the judgment was for recovery of the chattel detained, *or* its value, as found by the jury, if the chattel were not returned; with damages in either case for the detention. In fact, the wrong-doer had the option of returning the chattel or paying the value (c). But what real redress could

(a) See *Hall v. Hall*, 3 Macn. & Gor. 79.

(b) The authorities will be found collected and discussed in *Fairthorne v. Weston*, 3 Hare, 387.

(c) See the question as to the proper form of verdict learnedly discussed in *Williams v. Archer*, 5 Common Bench R. 318; and in *Phillips v. Jones*, 15 Queen's Bench R. 859. The Common Law Procedure Act, 1854,

this afford when the thing itself was wanted ? Take the case of a rare monument of antiquity,—the famous Pusey Horn, for instance, said to be the same under which the Pusey family in Berkshire held their lands of Canute the Dane. What damages could compensate for the loss of such a relic ? Or, to imagine an illustration which, at the present moment, will go home to the heart of each of you ; suppose that, some fifty years hence, a sword of honour,—a tribute of the present generation to him who has made the name of “ Havelock ” part of our history,—should be wrongfully withheld from some grandson of that brave man. Could any damages do justice ? Well, in cases of this sort the equity courts supplied and still supply the very remedy required.

They did so at an early though not very clearly defined date. In the time of Edward the Fourth, the question whether the court would give relief when title deeds were wrongfully detained, appears to have been still doubtful. We find a bill of this kind (with the answers and replications), of that monarch’s reign, in the preface to the second volume of “ The Calendars of Proceedings in Chancery (*a*) ; ” but in the year-book of the 9th Edward IV. (*b*), an instance is mentioned

17 & 18 Vict. cap. 125, s. 78, confers a new jurisdiction to compel specific delivery of the chattels ; but the power of compulsion is by distress only, and therefore less efficacious than that in equity.

(*a*) p. cxiv.

(*b*) pl. 41.—Mr. Spence mentions, Eq. Jur. vol. i. 643, note (*b*), instances of bills for the delivery up of a gilt cross, a crucifix (Henry the Eighth’s time), and a crimson bed (in the time of Philip and Mary) ; but I have been unable to verify the authorities to which he refers.

in which the plaintiff was sent to common law, *where he might have writ of detinue*.

In later times we find the case of *Pusey v. Pusey* (a), in which the subject-matter of litigation was the very Pusey Horn of which I spoke to you just now; and later still, in the year 1735, a case of *Duke of Somerset v. Cookson* (b), in which Lord Chancellor Talbot decided that a bill would lie by the plaintiff, lord of the manor, against defendant for delivery up of an old silver altar with a Greek inscription.

Next, as to specific performance. Here, again, the remedy at law was damages only, and in many cases wholly inadequate. A man purchased a piece of land near his house; on the strength of his purchase, he proceeded perhaps to arrange various alterations as respects buildings and pleasure grounds; probably he modified even his internal family arrangements. Perchance, he actually took possession and paid part of the purchase-money; yet, if before actual conveyance, differences arose between his vendor and himself, he was *at law* entirely in the power of the former. He might be ejected, and no amount of inconvenience, hardship, or mortification could entitle him at law to anything beyond *damages*. No country pretending to anything like a system of civilised jurisprudence could tolerate such a state of things. Accordingly, equity stepped in, and said, "These contracts must be performed." This, indeed, it did at a very early period (c).

(a) 1 Vernon, 273; anno 1684.

(b) 3 Peere Williams R. 389.

(c) The second case mentioned in the preface to the 2nd vol. of the

It has been occasionally the subject of observation, that the Court of Chancery, while interfering to rescue our jurisprudence from the disgrace of allowing contracts for sale of land to be violated upon payment of damages only, has erred rather in treating the time stipulated for performance of the contract as generally immaterial. Thus, as you are probably aware, if A sell land to B, and it be expressly stipulated that the contract shall be completed on a certain day, the default of either party in respect of time, does not *primâ facie* entitle the other to rescind the contract. To use the technical phrase, time is not deemed of the essence of the contract (a). It may be admitted perhaps that the equity courts have gone rather far in this respect, in interfering with the contracts of parties. Still, the error may well be forgiven, in consideration of the beneficial nature of the jurisdiction; and most of the objectionable results of the general rule in reference to time are avoided by the practice of conveyancers, who, whenever settling a stipulation in respect of which time is to be essential, add the words, “*and in this respect, time shall be deemed to be of the essence of the contract (b).*”

Calendars of Proceedings in Chancery, is a bill for specific performance (the date being Richard the Second's Reign); and at page xxvi. of the same preface there is another instance.

(a) There are certain well-established exceptions to the general rule—as where the subject-matter of contract is a mining lease, *Macbryde v. Weekes*, 22 Beavan, 533; or a life annuity, *Withy v. Cottle, Turner & Russell*, 78; or a public-house sold as a going concern, *Cowles v. Gale*, Law Rep. 7 Ch. App. 12.

(b) The late Lord Cranworth entertained strong opinions that the equity courts had gone to the utmost allowable limits in their interference with

I proceed to the third class of cases in which the remedy at law, though not positively inappropriate, was less easy and convenient than that in equity, embracing (I repeat the subdivisions)—

1. Account.
2. Dower.
3. Partition.

Account has been reserved for special and more detailed consideration in my eighth lecture; and I pass therefore at once to “Dower.”

You know of course what “Dower” was. It was the wife’s right to have for her life, after her husband’s death, one third part of any lands and tenements of which the husband was at his death, or had been at any time during their coverture, seised in fee simple or in fee tail.

The origin of this right of the widow has been the subject of much discussion. It was not originally derived from the feudal system, for its introduction into that system some time after it had formed part of the English law can be clearly traced (*a*). Blackstone assigns a Danish original to it (*b*).

Our concern here, however, is not with the history

the stipulations of contracts in regard to time : opinions which, in one case (*Parkin v. Thorold*, 2 Simons, N.S. 1, reported on the hearing at the Rolls, 16 Beavan, 59), led him to a decision practically at variance with doctrines of the court. But though the tendency of the modern decisions generally may have been to narrow the rule by means of exceptions such as those above alluded to, it still remains firmly established. See *Roberts v. Berry*, 3 De Gex, Macn. & Gor. 284, and the judgment of the Lords Justices Knight Bruce and Turner in *Wells v. Maxwell*, 33 Law Journal (N.S.) Chanc. 44.

(*a*) 2 Bl. Com. 129.

(*b*) Ibidem.

and general incidents of dower, but merely with the widow's remedy for enforcing her right. The course pointed out by Magna Charta was that the widow should remain in her husband's capital mansion-house for forty days after his death, during which time her dower should be assigned to her. This assignment it was the duty of the heir, or, if the heir were under age, then of his guardian, to complete (a). After assignment the widow had a right of entry, and, after entry, held of the heir by a kind of sub-infeudation. But the heir or guardian might neglect to assign, and in this case the widow's remedy at law was by a writ of dower.

Hitherto we have assumed that the husband died seised. But it must be recollected that the widow's title to dower applied as well to lands which the husband had conveyed away during the coverture, as to lands of which he died seised; and probably, upon investigation, a very large proportion of the litigated cases of dower would be found to be those in which the husband had conveyed away the land. Here, too, the remedy at common law was by writ of dower. But the widow's remedy at law was very imperfect. Her chief difficulty in asserting her rights would obviously be her ignorance of the facts on which her right to dower depended. Without knowing the contents of the deeds under which her husband derived title, she would neither know whether the estate taken by him was such as to entitle her to dower, nor with sufficient accuracy the

(a) See at Appendix F, p. lxxx. a precedent of assignment of dower by the heir, extracted from the "Perfect Conveyancer," printed in 1655.

precise lands. And in those cases in which the land had been conveyed away by the husband in his lifetime, the widow was especially helpless from her ignorance. This ignorance the equity courts aided by the exercise of their powerful engine "*Discovery*," compelling the heir or alienee to answer on oath detailed interrogatories, put to him for the purpose of ascertaining the true facts respecting the title and situation of the lands.

Discovery, indeed, may be said to have been the foundation of the equity jurisdiction in reference to dower. There were other causes, however, which tended to confirm the jurisdiction. Amongst them may be mentioned the circumstance that, upon the death either of the tenant or of the widow before assessment of damages for withholding her dower, the right to the damages was at law lost; whereas a court of equity would decree what was due upon the result of the account to be paid either *by* the representative of the heir, or *to* the representative of the widow. This was the point decided by Lord Alvanley, in the celebrated case of *Curtis v. Curtis (a)*, the judgment in which ought to be read and re-read by every one who wishes to gain correct notions respecting the equitable jurisdiction in cases of dower.

Again, under the law as it existed previously to the recent Act for the extinguishment of satisfied terms (*b*), where the widow sued at law for dower against the heir or devisee, and there happened to be a satisfied term of years created antecedently to her title of dower accru-

(a) 2 Brown's Chancery Cases, 620.

(b) 8 & 9 Vict. cap. 112.

ing, all that the widow could obtain at law was a judgment with a stay of execution (*cesset executio*) during the continuance of the term—in substance a fruitless judgment. In these cases she came to a court of equity, and the term was removed out of her way. For these combined reasons the Court of Equity assumed and still exercises an independent concurrent jurisdiction in reference to dower.

The case of dower is indeed a peculiarly apt instance of “*concurrent jurisdiction* ;” for you must bear in mind that until the late Dower Act, the wife was not dowable out of equitable estates, though the husband had his curtesy thereout ; so that, previously to that Act, the wife necessarily came relying upon a purely legal title.

One remaining observation respecting dower. The late Statute of Limitations (a), when sweeping away some forty forms or so of real action, whose uncouth names may be read in the thirty-sixth section, yet retained, together with “*quare impedit*,” the writ of “*dower*,” and writ of “*right of dower*,” the only three real actions now remaining (b). In practice, however, the common law action, though not obsolete, is very rarely resorted to (c).

(a) 3 & 4 Will. IV. cap. 27.

(b) But now these actions are, in effect, by 23 & 24 Vict. c. 126, s. 26, abolished as real actions, and commence by writ of summons.

(c) The only reported modern instances of resort to the common law jurisdiction are, so far as I am aware, *Garrard v. Tuck*, 8 Common Bench R. 231 (which appears to have resulted in a compromise), *Gomm v. Parrott*, 3 Common Bench Rep. N.S. 47, and *Woodward v. Dowse*, 10 Common Bench Rep. N.S. 722, which last case was subsequent to the 23 & 24 Vict. c. 126.

Partition alone remains.

Partition may be said to be a legal remedy for the inconveniences of the most inconvenient of all species of ownership, viz. that in undivided shares.

Of this class of ownership there are three kinds, viz. :—

1. Coparcenary, which arises where, upon the death of a person leaving several co-heirs, the land descends to these co-heirs as co-parceners.

2. Joint tenancy, which occurs where property is limited to two or more persons without words of division.

3. Tenancy in common, where property is limited to several, with words added, defining the aliquot shares in which they are to take.

I intimated that the inconveniences of this class of ownership were great; let me advert to a few.

Each coparcener, joint-tenant, or tenant in common, had and has a right to enter upon every part of the land. If there were a house, for instance, each would be entitled to enter upon and partake in the occupation of every room in it. Again, each owner might receive the whole rents and profits, and the only remedy which the law gave was by an action of account (a). It might,

(a) See *Thomas v. Thomas*, 5 Exchequer, 28, where it was held that an action for money had and received will not lie. And where one tenant in common merely occupies and enjoys the land, as by farming at his own risk, no action of account lies at law in favour of the co-tenant. See *Henderson v. Eason*, 17 Queen's Bench Rep. 701, in Exchequer Chamber, overruling the previous decision of the Queen's Bench. Nor is there any remedy in equity in such a case—*Henderson v. Eason*, 2 Phillips, 308; a result which, notwithstanding the observations in the judgment of Parke B. in Exchequer Chamber, and Lord Cottenham's decision, can

indeed, be said almost that, except in the case of an actual expulsion of one owner by the other or others, there was no remedy of any value short of partition.

Thus Littleton (a), after having pointed out in the previous section that one tenant in common might have an action of ejectment against the other, *if the other put him out of possession and occupation*, proceeds to state that no action of trespass, "*Quare clausum suum fregit et herbam suam, &c. conculcavit*," will lie by one against the other, for that each may enter and occupy in common the lands and tenements which they hold in common; that is to say, in substance, each might use or abuse the land "*ad libitum*."

In the case of an undivided ownership of chattels personal, the legal results were and still are even more inconvenient (b). Thus, in the same section, Littleton continues in these words: "but if two be possessed of "chattells personalls in common by divers titles, as of "an horse, an oxe, or a cowe, &c., if the one take the "whole to himselfe out of the possession of the other, "the other hath no other remedie but to take this from "him who hath done to him the wrong, to occupie in "common, &c., *when he can see his time*."

The position of the parties sometimes was, and might even now still be, that which is ludicrously described in the American story, viz.: Two men are tenants in common of an elephant, and one declines either to pay any-

hardly be viewed as satisfactory. But where a tenant in common occupies in exclusion of an infant co-tenant, he is chargeable in equity with an occupation rent; *Pascoe v. Swan*, 27 Beavan, 508.

(a) Sect. 323.

(b) And for these inconveniences there is no remedy, equitable or legal.

thing to the other in the shape of profits of exhibition, or to buy his co-owner's share, and is at last brought to reason only by the threat of the injured party to shoot his undivided moiety (a).

You must, I think, by this time, be sufficiently satisfied that some remedy was wanted against the inconveniences of undivided ownership. The common law, however, afforded none, except in the case of *coparceners*, for whose benefit there lay a writ *de partitione faciendâ*. Joint tenants and tenants in common were obliged, until the reign of Henry VIII., to bear their fetters as they best could. No doubt good sense and agreement of the parties mitigated the defect of the law (b). The absence, however, of any power of com-

(a) Notwithstanding the humour of the story, it must be taken to be clear as a matter of law, that if the threat had been carried into execution, the shooter would have been liable in damages to the extent of one moiety of the difference in value between the live and the dead elephant. In fact, destruction of the chattel is, in reference to undivided ownership of chattels personal, the analogous case to actual expulsion in the case of land. Thus Lord Coke in his commentary on Littleton says:—"If two tenants in common be of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the tenant in common shall have an action of trespass, *quare vi et armis columbare le plaintiff fregit et ducentas columbas pretii 40s. interfecit per quod volatum columbaris sui totaliter amisit*, for the whole flight is destroyed, and therefore he cannot in bar plead tenancie in common." Upon the question, how far a tenant in common, who does not actually destroy the common chattel, but merely sells it, is liable to his co-owner, see *Mayhew v. Herrick*, 7 Common Bench R. 236. And see further, *Fraser v. Kershaw*, 2 Kay & Johnson, 496.

(b) We find mentioned in Littleton a great variety of different modes of partition by agreement. It may be not uninteresting to hear him tell one of them in his own words:—

"Another partition or allotment is, as if there be four parceners, and after partition of the lands be made, every part of the land by itself is written in a little scrowle and is covered all in waxe in manner of a

selling a partition in the case of joint-tenants, and tenants in common was by the time of Henry VIII. felt to be an evil calling for legislative interference; and accordingly by the 31st Henry VIII. cap. 1, joint-tenants and tenants in common of estates of inheritance were made compellable to partition; and by the 32nd Henry VIII. cap. 32, joint-tenants and tenants in common for life or for years were placed in the same position.

Still the proceedings at law were deficient in power of adaptation to the circumstances of the different cases arising. The procedure was as follows:—The plaintiff sued out the writ of partition. There was a judgment that partition should be made; and then a writ issued to the sheriff to summon a jury and make partition (*a*). But the sheriff had no power, however desirable it might be, to divide the land unequally, and award payment by one owner to the other of money for equality of partition (*b*). And although so late as the reign of William III. we find an Act of Parliament passed expressly for the purpose of regulating the common law

“little ball, so as none may see the scrowle, and then the four balls of
 “waxe are put in a hat to be kept in the hands of an indifferent man,
 “and then the eldest daughter shall first put her hand into the hat,
 “and take a ball of waxe with the scrowle within the same ball for
 “her part, and then the second sister shall put her hand into the hat
 “and take another, the third sister the third ball, and the fourth sister
 “the fourth ball, &c., and in this case every one of them ought to
 “stand to their chance and allotment.”—*Littleton*, sect. 246.

(*a*) See form of writ stated, Coke Litt. 167 (*b*).

(*b*) And in equity, an express direction in the decree is necessary to authorise the commissioners to award sums for owelty of partition. See *Mole v. Mansfield*, 15 Simons, 41.

procedure in partition cases, yet the equity jurisdiction, which would seem to have been first assumed towards the end of the reign of Queen Elizabeth (a), gradually gained ground upon that at common law, until the common law writ of partition became rather a matter of antiquarian interest than of practical importance. Finally, in the year 1833 (b), the Legislature, when abolishing, with the three exceptions above adverted to (c), all real actions, included amongst the abolished forms the writ of partition; and thus, by Act of Parliament, gave to the Court of Equity exclusively a jurisdiction which had long belonged practically to equity alone. Thus, the jurisdiction in partition might be now said to be *exclusive*; but having regard to its history, it is properly, and more conveniently, included as a head of *concurrent* jurisdiction.

One defect there was, indeed, to which the equitable jurisdiction in matters of partition was, until quite lately, equally with that at law, subject. It was this; there was no power to decree a partition of copyhold lands. Where a mixed inheritance of freeholds and copyholds was held in undivided shares, the court might decree a partition in a qualified sense by giving all the copyholds to one, and adjusting the rights by directing payment of money for equality of partition (d). But where the *whole* of the property was copyhold, there were technical difficulties in reference to binding the rights of the lord of the manor; and the late Vice-Chan-

(a) See *Speke v. Walrond*, Tothill, 155.

(b) See 3 & 4 W. IV. cap. 27, s. 36.

(c) p. 155, *supra*.

(d) See *Dillon v. Coppin*, 6 Beavan, 217, note (a).

cellor of England, in the case of *Horncastle v. Charlesworth* (a), expressly decided that a bill would not lie in equity for the partition of copyholds.

This defect, or supposed defect, of jurisdiction was, however, remedied by the Copyhold Enfranchisement Act, passed in the year 1841 (b), by which it was enacted and *declared*, that it should be lawful for courts of equity to make the like decree for ascertaining the rights of the parties, and issuing a commission to make partition, as by the practice of the court might be made with respect to lands of freehold tenure.

The equity procedure in partition suits differed little, if at all, during the growth of this head of jurisdiction, from what it is at the present day. It is now as follows :—The plaintiff seeking a partition files his bill, bringing before the court the owners of the other undivided shares. Upon the right to a partition being established at the hearing, the form of decree is, that a commission do issue (c) to commissioners to divide the estate, and that the parties do execute mutual conveyances. The commission issues. The commissioners divide the estate and make their return to the commission, setting forth the division made by them; and upon the return coming in, mutual conveyances (d)

(a) 11 Simons, 315; see, too, *Joze v. Morshead*, 6 Beavan, 213.

(b) 4 & 5 Vict. cap. 35, s. 85.

(c) Under the more recent practice the decree declares the right, and proceeds to direct that proposals for a partition be laid before the Judge at Chambers; see *Clarke v. Clayton*, 2 Giffard, 333; and *Mr. Barber's Statement*, Appendix, p. xlvii.

(d) By means of the 30th section of the Trustee Act, 1850 (13 & 14 Vict. cap. 60), a statutory conveyance may now be obtained, even where parties

are executed in conformity with the division made by the commissioners (a).

My *classified* heads of equity are now exhausted; but there remains yet one subject of equity jurisprudence which it is impossible to range accurately within any one of the other classes mentioned, and which nevertheless demands some notice. I mean, *Set-off*.

By the civil law, if A was indebted to B, and before he discharged his liability B became indebted to him, what was called "*compensation*" took place; that is to say, A's liability to B became "*ipso facto*" extinguished, partially or wholly, according to the amount of B's liability to him. This doctrine of compensation was founded on a principle of natural equity or good sense, which forbids that a man should be compelled to pay one moment what he will be entitled to recover back the next; or, to use the words of the civil law, "*Ideo* "*compensatio necessaria est, quia interest nostrâ potius*

under disability are interested, *Bowra v. Wright*, 4 De Gex & Smale, 265. And see *Shepherd v. Churchill*, 25 Beavan, 21.

(a) The remedies of co-owners have received a large, and, on the whole, beneficial extension by the Partition Act, 1868 (31 & 32 Vict. cap. 40), which, in effect: (1) *authorises* the Court of Chancery (upon the request of any person interested, notwithstanding dissent or disability of the others) to decree a sale in the event of special circumstances rendering a sale more beneficial than partition; (2) *directs* the court, upon the request of persons beneficially interested to the extent of a moiety, so to decree, unless it sees good reason to the contrary; and (3) *authorises* the court to decree a sale upon the request of any person interested, unless the other persons interested undertake to purchase the share of the person requesting.

The first of these enactments is, it is believed, only in accordance with the codes of most foreign countries. The corresponding provisions of the Code Civil, Art. 827, is as follows: "*Si les immeubles ne peuvent pas se partager commodément il doit être procédé à la vente par licitation devant le tribunal.*"

“non solvere, quam solutum repetere (a). The same doctrine exists in those systems of jurisprudence which are grounded on the Roman law (b).

Now, the common law utterly refused to recognise this principle of justice. If B owed A money, and A owed B money, A was entitled to recover from B, although the amount of his own debt was greater, and although he might himself be in insolvent circumstances; and thus, by being first in the race, he might obtain judgment and payment of the amount recovered, leaving B to sue subsequently for his own debt, and recover a judgment of his own, bearing no fruits. Nay, even if A had actually become bankrupt, so that his assignees had become entitled to what was owing from B, the law allowed A's assignees to recover from B the whole amount, leaving B to go in under the bankruptcy and prove against A's estate, and recover a dividend only. The glaring injustice of this result in cases of bankruptcy, led to the first legislative mitigation, viz. that effected in Anne's reign (c), of allowing a set-off in cases of mutual credit and mutual debts between the bankrupt and any person (d).

(a) Dig. xvi. tit. ii. l. 3.

(b) See, for instance, the section on “*Compensation*,” beginning Art. 1289 of the French “*Code Civil*.”

(c) This statute is commonly referred to as 4 Anne, cap. 17, according to the order in which it appears in Ruffhead's Edition, where nothing beyond the title is given. In the edition of statutes published by the Record Commission, where the statute is given at length, it appears as 4 & 5 Anne, cap. 4. It was repealed by the Statute Law Revision Act, 1867.

(d) The 39th section of the “Bankruptcy Act, 1869” (32 & 33 Vict. cap. 71), may be said to be the legitimate descendant of this first enactment in mitigation of the common law doctrines.

About a quarter of a century later, by a short and unobtrusive section, in an Act which is entitled “An Act for the Relief of Debtors, with respect to the imprisonment of their persons (a),” a most important alteration was effected in the law, by enacting, that, in cases “of mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator and intestate and either party, one debt may be set off against the other.” And it is under this enactment, as made perpetual and extended by a subsequent Act (b), that the right of set-off still exists at law.

Such is the short history of the right of “set-off” at common law.

To perform what is more particularly my duty, viz., to give a short account of *Set-off*, as a head of equitable jurisdiction, is by no means so easy. Indeed, the views which have been judicially expressed respecting *set-off*, in equity, by judges of considerable authority, would deprive it altogether of its position as a distinct head of concurrent equity jurisprudence.

Lord Mansfield, in a passage which has been often quoted, thus expresses his views on the subject (c):—

“*Natural Equity* says, that cross demands should compensate each other, by deducting the less sum from the greater; and that the *difference* is the only sum which can be *justly* due.

(a) 2 Geo. II. cap. 22, s. 13.

(b) 8 Geo. II. cap. 24, ss. 4, 5.

(c) *Green v. Farmer*, 4 Burrow, 2214; see page 2220.

“ But *positive law*, for the sake of the forms of
“ proceeding and convenience of trial, has said that
“ each must sue and recover,—separately, in *separate*
“ *actions*.

“ It may give light to this case and the authorities
“ cited, if I trace the law relative to the doing complete
“ justice in the *same* suit, or turning the defendant
“ round to *another* suit, which under various circum-
“ stances may be of no avail. Where the nature of
“ the employment, transaction, or dealings necessarily
“ constitutes an account consisting of receipts and pay-
“ ments, debts and credits, it is certain that only the
“ *balance* can be the debt; and by the proper forms
“ of proceeding in courts of law or equity, the balance
“ only can be recovered.

“ *After* a judgment, or decree ‘to account,’ both
“ parties are equally actors.

“ Where there were *mutual* debts *unconnected*, the
“ law said they should not be set-off; but each must
“ sue. And courts of equity followed the same rule,
“ because it was the law; for, had they done otherwise,
“ they would have stopped the course of law, in all
“ cases where there was a mutual demand.

“ The natural sense of mankind was first shocked at
“ this, in the case of *bankrupts*: and it was provided for
“ by 4 Anne, cap. 17, s. 11; and 5 Geo. II., cap. 30,
“ s. 30. This clause must have, everywhere, the *same*
“ construction and effect, whether the question arises
“ upon a summary petition, or a formal bill, or an action
“ at law. There can be but one right construction:
“ and therefore if courts differ, one must be wrong.

“Where there was *no* bankruptcy, the injustice of
 “not setting-off (especially after the death of either
 “party) was so glaring, that Parliament interposed,
 “by 2 Geo. II., cap. 22 ; and 8 Geo. II., cap. 24, s. 5.
 “But the provision does not go to *goods* or other
 “*specific* things wrongfully detained ; and therefore
 “neither courts of law nor equity can make the plain-
 “tiff who sues for such goods pay first what is due to
 “the defendant ; except so far as the goods can be
 “construed *a pledge* ; and then the right of the
 “plaintiff is only to redeem.”

In reference to the particular passage in which Lord Mansfield observes, *equity followed the same rule, because it was the law*, we must of course bear in mind his Lordship’s anxiety on all occasions to assimilate, nay, almost to fuse, “law and equity.”

However, some eight years or so before the judgment of Lord Mansfield, which has just been quoted, we find Sir Thomas Clarke, Master of the Rolls, who was well acquainted with the doctrines of equity, referring the equitable doctrines to the Roman law (*a*). In this case, which is very ill reported, after adverting to the Roman law, and then to the English statute law, in a mode calculated to throw some doubt upon the meaning of the passage which we proceed to quote, the Master of the Rolls continues thus :—

“Equity took *it* (*b*) up, but with limitations and

(*a*) See *Whitaker v. Rush*, Ambler, 407.

(*b*) *i.e.* as I understand the judgment, “the rule, as to set-off,” originally existing in the Roman law, and partially introduced into the English law by statute.

“restrictions; and required, that there should be a
“connexion between the demands.”

And, on a late occasion (a), Lord Justice (then Vice-Chancellor) Turner, after referring to two cases (b), in which questions as to *set-off* (or rather *stoppage*, to adopt the precise word used) came in question previously to the earliest statutory enactment respecting set-off, expresses himself thus: “It is clear, therefore, that the
“rights of debtors and creditors, in cases of cross
“demands between them, as their rights subsisted in
“equity, were not derived from or dependent upon any
“statutory right of set-off; and, on the other hand, it
“seems not to be improbable that the statutory rights
“were derived from the equitable rule.”

With such an expression from so high an authority, it was of course impossible to omit all notice of “set-off” from a general review of the concurrent equity jurisdiction; but there will be little inaccuracy in saying that, in reference to cross demands of a purely legal nature, no jurisdiction is practically exercised in equity. Important questions of set-off do undoubtedly come before the equity courts for decision where one or both of the cross demands is purely equitable; as, where A being indebted to B, B assigns the debt (which, as a *chose in action*, is not assignable at law) to C; and then, subsequently, A sues C upon a legal debt owing to him from C. Here, A is creditor of C *at law*, and

(a) *Freeman v. Lomas*, 9 Hare, 112. Lord Justice Turner, in his judgment in this case (see p. 113), intimates his opinion that the report of *Whitaker v. Rush* is erroneous.

(b) *Curson v. African Company*, 1 Vernon, 121; *Peters v. Soame*, 2 Vernon, 428.

C is creditor of A *in equity*. At law C would have no right of set-off; but he files his bill in equity, and obtains it. The case of *Clark v. Cort* (a) is a good sample of the exercise of the equitable jurisdiction in instances of this kind (b); and that of *Cavendish v. Geaves* (c) will be found to contain some important principles, laid down by the present Master of the Rolls, in reference to equitable set-off.

With this exceptionally circumstanced head of equity, my notice of the concurrent jurisdiction of the court must end.

(a) *Craig & Phillips*, 154.

(b) See also *Unity, &c., Association v. King*, 25 *Beavan*, 72; and as to setting-off a debt due to a testator against a share of residue bequeathed to the debtor, see *Bousfield v. Lawford*, 33 *Law Journal* (N.S.) *Chanc.* 26.

(c) 24 *Beavan*, 163.

LECTURE VI.

THE division of equity jurisprudence reserved for this evening's lecture is one which, in practical importance, occupies a very different position from that which it held only a few years since.

Of the *auxiliary jurisdiction* of the court it may be said that it has diminished, is diminishing, and may probably, ere long, under the amending hand of the Legislature, vanish altogether. Nor can this be properly a subject for regret. That our common law tribunals should, in matters peculiarly within their own cognisance, need the aid of equity courts to enable them to do justice efficiently, must surely be a reproach to our judicial system.

In the division of equity which was treated in the last preceding lecture, viz., the *concurrent jurisdiction*, considerable difficulty occasionally occurs in determining whether the circumstances of the case in hand do in fact bring it within some head of concurrent jurisdiction; but so soon as this difficulty has been surmounted, the equity court takes entire cognisance of the matter. Sometimes, no doubt, the suitor may make a wrong selection of tribunal, and be turned round to law. But this is merely an occasional and not an inseparable incident of the concurrent jurisdiction.

Not so in the *auxiliary jurisdiction*. In cases which fall within its ambit, the remedy prescribed for the unfortunate suitor by our conjoint jurisprudence is, a certain amount of *law* and a certain amount of *equity*; and one may say, with perfect impartiality, that neither imparts a relish to the other.

While then, as a member of the Chancery bar, I might be pardoned some lurking feelings of regret at witnessing the decline of any head of equity jurisdiction, honesty and good sense call upon me to hail the change as one decidedly beneficial to the community at large.

But, notwithstanding the decline alluded to, it must be some time yet before any one undertaking to give a sketch of equity jurisprudence can venture to omit all notice of the *auxiliary jurisdiction* of the court; and I am not without hope that what I have to say this evening will prove not only valuable in perfecting your theoretical notions respecting equity, but also practically useful.

Now the cases in which equity merely assisted the law without assuming entire jurisdiction over the matter, may be conveniently classed as follows:—

Firstly. Cases in which equity aided the infirmity of the law in regard to *evidence*, comprising—

- (1.) Discovery.
- (2.) Perpetuation of Testimony.
- (3.) Examination of Witnesses *de bene esse* (a).

Secondly. Cases in which equity aided the infirmity

(a) This phrase is intended to include the examination of witnesses who are abroad.

of the law, *either* by repressing needless and vexatious litigation at law where the right appeared to have been sufficiently tried there, as in bills of peace; *or* by providing for a fair and sufficient trial in the proper *forum*, as in the case of bills to establish wills (*a*).

Let us take the *first* subdivision of the *first* class, viz., Discovery.

In order to appreciate accurately the necessity for the auxiliary jurisdiction of equity in affording discovery, we must cast a short retrospect upon the law of evidence as it existed previously to the recent changes.

The general rule, as established at the time when

(*a*) The old head of jurisdiction exercised in the case of bills for a receiver of personal estate *pendente lite* in the Ecclesiastical Court, was strictly of an *auxiliary* kind. The leading features of the principles and practice under this head of jurisdiction will be found collected in the following cases, or in those there cited:—*Watkins v. Brent*, 1 Mylne & Craig, 97; *Marr v. Littlewood*, 2 Mylne & Craig, 454; *Rendall v. Rendall*, 1 Hare, 152; *Whitworth v. Whyddon*, 2 Macn. & Gor. 52; *Barton v. Rock*, 22 Beavan, 81. But under the new Act (20 & 21 Vict. cap. 77) the Court of Probate has power (by sect. 70), pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, to appoint an administrator of the personal estate of such deceased person; and, although the jurisdiction of the court to appoint a receiver is not put an end to, a stronger case for the appointment of a receiver must now be made than before the Act; *Hitchen v. Birks*, L. R. 10 Eq. 471. And when an administrator *pendente lite* had been appointed by the Court of Probate, after bill filed for a receiver, the Court of Chancery refused to appoint a receiver; *Veret v. Duprez*, L. R. 6 Eq. 329. On the other hand, the Court of Probate will appoint an administrator *pendente lite*, if it is just and proper so to do, although a receiver may have been already appointed by the Court of Chancery, *Tichborne v. Tichborne*, L. R. 1 P. & D. 730. The occasions for resort to the jurisdiction of the Court of Chancery under this head must, therefore, now become extremely rare.

Bentham wrote, was that every person interested in the pending litigation was disqualified from giving evidence. Bentham, I believe, first pointed out that, *as a rule*, no witness ought to be disqualified on account of *interest* only, and that the objection to the evidence of an interested person ought to be treated not as an objection to the *reception* of his evidence, but merely as detracting from its *weight* when received.

After seeing the general rule of the old law first broken in upon in 1833 by the Common Law Amendment Act of that year (*a*), which provided, in substance, that witnesses might be examined notwithstanding objection made that a verdict or judgment in the action would afterwards be admissible in evidence for or against themselves; and then annulled in 1843 by Lord Denman's Act (*b*), which made interested persons good witnesses, *as the rule*, though retaining special instances of disqualification on the ground of interest, as in case of the parties plaintiff and defendant themselves; we at last, some six years back (*c*), witnessed the final triumph of Mr. Bentham's views. The Act then passed (*d*) rendered, with a few exceptions (*e*),

(*a*) 3 & 4 Will. IV. cap. 42, ss. 26, 27.

(*b*) 6 & 7 Vict. cap. 85.

(*c*) The lectures were read in 1857-8.

(*d*) 14 & 15 Vict. cap. 99.

(*e*) The exceptions, so far as relates to civil proceedings, have now disappeared. They were abolished as to husbands and wives (except in proceedings for adultery) by 16 & 17 Vict. cap. 83, and after intermediate enactments (21 & 22 Vict. cap. 108, s. 11; and 22 & 23 Vict. cap. 61, s. 6); this exception, as respects proceedings in adultery, was abrogated by the 32 & 33 Vict. cap. 68; by which last Act the exception applicable to actions for breach of promise of marriage was also abolished.

even plaintiffs and defendants competent and compellable to give evidence.

Now you will have observed that the persons whose evidence was thus excluded under the old law, may be ranged into two classes, viz. :—

1st. Interested persons not actually themselves litigant. The evidence of these was first made generally receivable by Lord Denman's Act.

2ndly. The litigants themselves, who were first made competent and compellable to give evidence by the Act of 1851.

The auxiliary jurisdiction of equity in compelling a discovery was directed to the mitigation of the evils caused by the disqualification of the latter of these two classes, *i.e.*, *the parties litigant*.

These evils, but for the interference of equity, must indeed have been extreme. Thus, a plaintiff at law might sue a defendant notwithstanding the existence of circumstances known only to the parties litigant, but which, if given in evidence, would afford a good defence to the action. Let me put, as a possible case, that of a plaintiff suing for goods sold and delivered, the defendant having personally paid the price to the plaintiff in cash. At common law the defendant was remediless. The plaintiff proved the delivery of the goods, and recovered the value. Equity, however, allowed the defendant, under these circumstances, to file a bill against the plaintiff at law, calling upon him to answer upon oath the interrogatories contained in it; and then the plaintiff at law, unless prepared to perjure himself, was obliged by his answer to admit

(though it might be with his own colouring) the substantial facts of the case.

This answer, although not evidence in the ordinary sense, might be given in evidence by the other party as an *admission* made by the plaintiff at law, just as any letter written by him admitting relevant facts might have been given in evidence. It was viewed strictly as an admission; so that if the plaintiff in equity wished to give any portion in evidence upon the trial at law, he was obliged to read the whole, and make the whole evidence.

Of course you will understand that a plaintiff at law had just as much right to file a bill for discovery in equity in aid of his action at law, as had a defendant at law against the plaintiff in aid of his defence. And you will bear in mind that, in addition to the cases in which the object of the bill was to obtain an admission of facts exclusively within the knowledge of the parties litigant, there were many others in which the aim was to obtain a discovery and production of documents; an object effected in equity by means of the ordinary interrogatory as to documents and subsequent motion for production (a).

(a) It must be borne in mind, however, that the more searching character of the equity procedure in reference to production of documents was not "*per se*" a sufficient ground for a bill of discovery. Thus a bill for discovery would not lie against a mere witness, notwithstanding the inferior efficacy of a *subpoena duces tecum*; *Fenton v. Hughes*, 7 Vesey, 291. A singular statutory exception is to be found in the enactments (6 & 7 W. IV. cap. 76, s. 19; 32 & 33 Vict. cap. 24) authorising bills for the discovery of the names of printers, publishers, and proprietors of newspapers, as to which see *Dixon v. Enoch*, L. R. 13 Eq. 394.

By these means the shortcomings of the law in respect to evidence were in some measure remedied. I say in some measure, because the *admission* of a third person being no evidence against a party litigant, the assistance of the court could in no way be made available to supply the exclusion of the evidence of persons falling within the first class. In fact the *evidence*, in the technical sense of the word, of each class, was excluded equally in equity and at law; and the rule was perfectly settled, that no bill of discovery lay against a mere witness (a).

Here let me remind you, that discovery always formed and still forms part of the procedure of the court of equity, in those cases in which it grants relief in the exercise either of its *exclusive* or of its *concurrent* jurisdiction. The defendant was and is, in those cases, compellable to answer interrogatories which formerly were contained in the body of the bill, and now are delivered separately (b).

But the discovery granted by the court of equity as the handmaid of the courts of law, was obtainable only on very different terms from that which formed part of the ordinary procedure of the court. For the

(a) There was a special exception in the case of the secretary or other public officers of a corporation, who might be made co-defendants with the corporation for the purpose of obtaining discovery in the case either of a bill for relief or of a bill for discovery only; *Glascott v. Copper Miners' Company*, 11 Simons, 305. As to obtaining against a corporation, under the new practice introduced by the 15 & 16 Vict. cap. 86, sect. 18 (see pages 80-83, *ante*), discovery respecting, and production of, documents without making an officer a defendant; see *Ranger v. Great Western Railway Company*, 4 De Gex & Jones, 74; *Clinch v. Financial Corporation*, L. R. 2 Eq. 271.

(b) See p. 79, *supra*.

moment the bill for discovery had been fully answered, the defendant, however strong a case he might have admitted against himself, was entitled to his costs in equity; and the plaintiff in equity, even though ultimately successful, either as plaintiff or as defendant in the action at law, had to bear the entire costs of his bill of discovery. Consequently, except where the amount in dispute was large, a bill of discovery in equity was too costly a weapon for use.

When therefore we consider the onerous terms upon which only the equity courts granted discovery in aid of actions or of defences to actions at law, we cannot but view with satisfaction the statutory jurisdiction lately conferred on the common law tribunals—a jurisdiction which has rendered them practically independent of the auxiliary jurisdiction of equity in affording discovery.

The first step towards enabling the courts of law to do for themselves what equity had previously done for them, was that taken by the Evidence Act of 1851 (*a*), the Act which first made *parties* good witnesses. The sixth section is in these words: “Whenever any
“ action or other legal proceeding shall henceforth be
“ pending in any of the superior courts of common
“ law at Westminster or Dublin, or in the Court of
“ Common Pleas for the County Palatine of Lancaster,
“ or the Court of Pleas for the County of Durham,
“ such court and each of the judges thereof may re-
“ spectively, on application made for such purpose by
“ either of the litigants, compel the opposite party to

(*a*) 14 & 15 Vict. cap. 99.

“ allow the party making the application to inspect all
“ documents in the custody or under the control of
“ such opposite party relating to such action or other
“ legal proceeding, and, if necessary, to take examined
“ copies of the same, or to procure the same to be
“ duly stamped, *in all cases in which, previous to the*
“ *passing of this Act, a discovery might have been*
“ *obtained by filing a bill or by any other proceeding in*
“ *a court of equity* at the instance of the party so
“ making such application as aforesaid to the said
“ court or judge.”

The penman of this enactment would appear to have been but imperfectly acquainted with the equity system of discovery. The section is directed merely to compelling the production and inspection of documents, which constitutes but a portion of discovery in the general sense of the word; indeed the word “discovery” is, in equity, more commonly applied to that discovery which is obtained directly from a defendant’s answer, and not indirectly by production. And yet, in this section, “inspection or production of documents” and “discovery” seem to be viewed as equivalent things.

The absence of any provision in the Act for compelling a discovery generally in answer to interrogatories, is probably to be explained by the circumstance, that the framer of it considered the privilege thereby conferred of calling the opposite party as a witness, to be all that was really needed.

In reference to the jurisdiction to compel inspection thus conferred by the Evidence Act, the common law

courts decided shortly after it came into operation, that the party applying for inspection must make out upon affidavit a *prima facie* case, stating with sufficient distinctness the nature of the documents of which he required inspection (a). The new jurisdiction as thus exercised was obviously far less beneficial to the party requiring discovery than in equity: where, upon an interrogatory calling upon the defendant to the bill of discovery to state what documents he had in his possession, he was compelled, first to answer, and subsequently to produce for inspection all which he admitted to be relevant and which were not specially privileged.

However, by the Common Law Procedure Act of 1854 (b), further and more elaborate provisions for compelling discovery were made.

By the 50th section, upon the application of either party to the action at law, and upon an affidavit by such party of his belief that any document to the production of which he is entitled is in the possession or power of the opposite party, the court or a judge may order the opposite party to answer on affidavit *what documents he has in possession or power relating to the matters in dispute*; and upon such affidavit being made, the court or judge may make such further order thereon as shall be just—*i.e.*, order an inspection or not.

The 51st section confers on either party a power of delivering written interrogatories to the opposite

(a) See *Hunt v. Hewitt*, 7 Exchequer R. 236.

(b) 17 & 18 Vict. cap. 125.

party (a), provided such party would be liable to be examined as a witness upon such matter; and the party interrogated must answer by affidavit, or, in default, a contempt of court will be deemed to have been committed. And by the 59th section, where the written interrogatories are not sufficiently answered, the court may direct an oral examination before a judge or master of the party interrogated.

In reference to the jurisdiction conferred by this last Act, the following points appear worth noting:—

1. The jurisdiction under the 50th section, in reference to inspection of documents, is more liberal to the party seeking discovery than that under the Act of 1851. For upon a mere affidavit of belief by either party (b) that the other party has some document in respect of which a right of discovery exists, the “*onus*” is cast upon such party of stating what relevant documents he has, pretty much as in equity. If, however, the rule is to be established that the party applying must in his affidavit describe the documents, that the court may see that they are documents *to the production of which he is entitled* (c), or even

(a) The public officer of a company suing nominally on behalf of the company is liable to be interrogated, at all events if he is a shareholder in the company; *McKewen P.O. v. Rolt*, 28 Law Journal (N.S.), Exchequer, 380.

(b) The case of a corporation being defendant or plaintiff, where there can be no affidavit of the party, appears to be a *casus omissus*; and where the party requiring discovery is abroad, there may be great difficulty in procuring an affidavit; see *Herschfield v. Clarke*, 11 Exchequer, 712. But in either case the jurisdiction under the Evidence Act of 1851 will often be found available.

(c) See *Thompson v. Robson*, 2 Hurlstone & Norman, 412; adhered to in *Woolley v. Pole*, 14 Common Bench Rep. (N.S.) 538.

specify some one document in order to entitle himself to the aid of the court (a), it is obvious that the common law jurisdiction under this section must occasionally fall short of the requirements of the party seeking discovery ; unless, indeed, the practice be introduced of first delivering an interrogatory respecting documents under section 51, and then, after the requisite knowledge respecting documents has thus been gained, applying for inspection under section 50 (b).

2. In regard to discovery upon oath under the 51st section, it will be seen that the right to administer interrogatories is made dependent on the party to be interrogated being liable to be called and examined as a witness upon such matter ; so that at first sight it might seem that the affidavit in answer to the interrogatories was intended to be viewed as *evidence*, and not as an *admission* under the old practice. The intention of the words referred to must, however, I conceive, be held to have been to reserve to the party interrogated the right of objecting to answer any particular interrogatory upon *any point* which as witness he might have

(a) See *Hewett v. Webb*, 2 Jurist, N.S. 1189 ; *Bray v. Finch*, 1 Hurlstone & Norman, 468 ; *Evans & Louis*, L. R. 1 C. P. 656.

(b) It is believed this practice has been introduced to a considerable extent : see *Adams v. Lloyd*, 3 Hurlstone & Norman, 351 ; though if the *ratio decidendi* in that case has been generally adhered to in the Common Law Courts, the discovery obtainable must fall far short of what may be gained in Equity. According to the Chancery practice, the oath of the person interrogated is accepted as conclusive only upon the question whether the documents mentioned by him are all that he has relevant to the matters in question ; but he is bound to schedule or describe all he has, whether privileged from production or not, leaving the Court to decide whether they shall, or not, be produced.

declined answering ;—say an interrogatory the answer to which might tend to criminate him, or an interrogatory calling for the disclosure of a communication made to the party by his wife during the marriage, specially protected by the 16 & 17 Vict. cap. 83 (a). And I am informed that the ordinary practice of the common law courts is to treat the affidavit of the party interrogated as an admission merely which cannot be put in evidence at all on behalf of the party making it, and which, if put in evidence by the interrogating party, must be put in evidence altogether, and the whole of it read.

One question yet remains before parting with the subject of discovery as a head of auxiliary jurisdiction. Have the recent powers conferred on the common law courts theoretically affected the auxiliary jurisdiction of the courts of equity? Practically, I believe a bill of discovery in equity is hardly ever now heard of. But circumstances might occur at the present day to render desirable a resort to equity for discovery ; say, for instance, a narrow construction by the common law courts of the powers of compelling inspection of documents. In such a case, if the stake were sufficiently large, a bill of discovery in equity might be desirable.

Upon principle, the jurisdiction must be held to remain. No doubt, under the old law, the equity courts declined to compel a discovery in aid of proceedings in

(a) Also, in accordance with the exception made by the 14 & 15 Vict. c. 99, s. 4, to exclude interrogatories in proceedings instituted in consequence of adultery and in actions for breach of promise of marriage ; as to which see now 32 & 33 Vict. c. 68, abolishing the exception.

courts having themselves the means of compelling it, such as the ecclesiastical courts (a). But it is a *canon* of equity jurisprudence, that no alteration of the law removing difficulties or impediments which originally led to an assumption of jurisdiction in equity, can operate to deprive the court of a jurisdiction once assumed. Thus, in *Kemp v. Pryor* (b), where it was argued that in consequence of the greater latitude assumed by courts of law in modern times, the bill in that case should have been a bill for discovery merely, and not for discovery and relief; Lord Eldon thus expresses himself:—
“Farther, I cannot admit, that if the subject would
“have been a subject of equitable demand previously
“to the extension of the exercise of the principle upon
“which a court of law is authorised to act in the action
“for money had and received, that court sustaining an
“action they would not have sustained forty years ago
“is an answer to a bill that would have been sustained
“in this court at that time. Upon what principle can
“it be said the ancient jurisdiction of this court is de-
“stroyed, because courts of law now, very properly
“perhaps, exercise that jurisdiction which they did not
“exercise forty years ago? Demands have been fre-
“quently recovered in equity, which now could be
“without difficulty recovered at law. * * *
“I cannot hold that the jurisdiction is gone merely
“because the courts of law have exercised an equitable
“jurisdiction, more especially in the action for money
“had and received.”

(a) See *Dunn v. Coates*, 1 Atkyn's Rep. 288; and an Anonymous Case, 2 Vesey senior, 451.

(b) 7 Vesey, 237.

You will observe, that in the case before Lord Eldon, the discussion was respecting instances in which the court had been in the habit of affording *relief*, in consequence of the inadequacy of the common law jurisdiction. The same principle must, however, it is conceived, apply to the *auxiliary jurisdiction* of the court in affording *discovery*. The following dilemma seems, however, inevitable—Either the common law jurisdiction in affording discovery will prove equally efficacious with that in equity, in which event a common law litigant will certainly not come into equity for discovery at his own expense; or it will prove less so, and no ground can be alleged in that event for the equity courts ceasing to exercise their ancient jurisdiction (a).

We proceed now to the *second* subdivision of the *first* class, viz., Perpetuation of Testimony.

It happens occasionally that a person entitled presumptively to some future interest in property, finds his title impeached or threatened by some other person interested in disputing it; and yet, in consequence of the future or reversionary nature of that title, the law affords him no means of asserting and establishing it. Meanwhile the very testimony upon which his title depends may be in danger of perishing by the death of those who, if alive, would be able to give evidence in its support. In this state of things, it is competent to the party claiming such future interest to file a bill in

(a) The observations of Lord Hatherley (when V.-C. Wood), in the case of the British Empire Shipping Company v. *Somes*, 3 Kay & Johnson, 437, which had escaped me, when writing the above, fully support the jurisdiction.

equity against all those who are interested in disputing it, asking that witnesses may be examined respecting the point in controversy, and that the testimony may thus be perpetuated (a). Perhaps the best instance that could be given of a suit of this class, is the case of *Dursley v. Fitzhardinge Berkeley* (b). It arose out of the circumstances which at a later date gave rise to the well-known *Berkeley Peerage Case* (c) in the House of Lords.

The plaintiffs were four infant sons of the then Earl Berkeley, the first plaintiff on the record (there called Lord Dursley, and then about fifteen) being the same person who in later life was well known, first as Colonel Berkeley, and subsequently as Lord Fitzhardinge.

The defendants were two other infant sons of Earl Berkeley, and also Admiral Berkeley, a brother of the then Earl, and the son of the Admiral. The bill stated that certain estates stood limited to the Earl for life, with remainder to his first and other sons in tail male, with remainder to Admiral Berkeley for life, with remainder to his first and other sons in tail male, and stated in detail the question respecting which perpetuation of testimony was sought, viz., an alleged marriage between the Earl and his Countess in 1785. There had been a subsequent marriage in 1796. The four plaintiffs were all born before this subsequent marriage

(a) It would seem that originally the practice was to file a bill against the witnesses themselves. See *Earl of Oxford v. Sir James Tyrell and Others*, *Calendars of Proceedings in Chancery*, vol. i. p. cxx.

(b) 6 Vesey, 251.

(c) The case is, I believe, not reported, but the Minutes of the Evidence taken in 1799 and 1811 will be found amongst the House of Lords' printed papers.

—their two infant defendant brothers after it. The legitimacy of the latter was undoubted, whichever marriage prevailed. The legitimacy of the plaintiffs depended upon the fact of the solemnization of the alleged prior marriage. Now you will observe that the then Earl of Berkeley was actually tenant for life in possession, so that no means existed of litigating the question of legitimacy (*a*); and under these circumstances the infant plaintiffs prayed that the evidence of the alleged marriage of 1785 might be perpetuated.

The particular point decided in the case was, that the infant plaintiffs were entitled to perpetuate testimony against Admiral Berkeley and his son, notwithstanding the *remote position of the latter in the order of entail*; but the judgments of Lord Eldon (he delivered two) are replete with valuable information, and will be found to contain the leading doctrines of the court in reference to the head of equity now under consideration. These, at the date of Lord Eldon's judgment (for they have been somewhat modified by a statute to which I shall presently advert), may be shortly thus stated.

First—Any interest, however small and remote, and though contingent only, is sufficient to sustain a bill for perpetuating testimony. This was the point upon which Lord Eldon's decision turned. He argued thence that, *à fortiori*, Admiral Berkeley and his infant son, though only remote remainder men, might, as having *vested* remainders, have sustained a bill against the infant plaintiffs to perpetuate testimony of their *illegitimacy*,

(*a*) See now "The Legitimacy Declaration Act, 1858" (21 & 22 Vict. cap. 93.)

and that therefore the plaintiffs were, *e converso*, entitled to file a bill against them.

Secondly—The court declines to perpetuate testimony of a right which might be immediately barred by the defendant against whom perpetuation is sought, as in the case of a remainder man filing a bill against tenant in tail in possession.

Thirdly—A mere expectancy, or *spes successionis*, was not considered sufficient to sustain a bill (a).

Thus, the heir at law or next of kin for the time being were not entitled to file a bill to perpetuate evidence of their heirship or relationship. Referring to the case of a lunatic, Lord Eldon says: “Put the case as high as possible, that the lunatic is *intestate*; that he is in the “most *hopeless state*; a moral and physical impossibility, “though the law would not so regard it, that he should “ever recover, even if he was *in articulo mortis*, and “the bill was filed at that instant, the plaintiff could “not qualify himself as having an interest in the subject of the suit.” We shall see presently the effect of the late statute upon this point.

Fourthly—A bill to perpetuate testimony only applied where some right to *property* was involved. This (which I may observe, you will *not* find laid down in the case before Lord Eldon) was admitted in the Townshend Peerage Case (b), which I am about to mention.

This case (that of the Townshend Peerage) was not only remarkable in its circumstances, but important as

(a) See *Smith v. Attorney-General*, Romilly's Notes of Cases, 54.

(b) 10 Clark & Finnelly, 289.

having led to a statutory extension of the law with regard to the perpetuation of testimony. It came before Committees of Privileges of the House of Lords twice; viz., in 1842 and 1843. The facts were shortly these.

The late Marquis Townshend (when Lord Chartley) in 1807 intermarried with one Miss —; who in 1808 left him, and instituted a suit against him for nullity of marriage, alleging his impotency. Dropping that suit, she eloped in 1809 from her father's house with a Mr. —, and went through a ceremony of marriage with him at Gretna Green. During many years' cohabitation with him, several children were born, who at first were named after him, and educated as his children; but, in 1823, they and their mother assumed the names and title of the peer. The Marquis generally lived abroad, had no access to his wife, knew of her infidelity, but took no proceedings to dissolve the marriage or bastardize the children. In 1841, the eldest of the children, then of full age and calling himself "*Earl of Leicester*," was elected for the borough of Bodmin, and returned in the writ as "the Honourable John Townshend, commonly called the Earl of Leicester," and he declared his qualification to sit in the House of Commons to be as eldest son of a peer of the realm.

Under these circumstances, a petition was, in 1842, presented to the House, by the next brother of the Marquis Townshend, setting forth in considerable detail the facts just stated, stating that he was advised he had no means of disputing the legitimacy of the person

so calling himself Earl of Leicester, and praying that their lordships would provide such remedy and adopt such proceedings as to their lordships might seem meet (a).

The result of this petition was the introduction by Lord Cottenham into Parliament of a bill, which subsequently became law, as the Act of the 5 & 6 Vict. cap. 69.

By this Act (after a preamble reciting that it was expedient to extend the means of perpetuating testimony

(a) The petition concluded thus :—

“ That some of the witnesses by whom only many of the most important
“ facts can be proved, are far advanced in life, and in uncertain health ;
“ and other persons whose testimony is material, refuse to make any
“ disclosures unless compelled by a court of justice ; but if any of these
“ persons should happen to die in the lifetime of the Marquis, it may be
“ impossible to prevent an individual, notoriously begotten and born in
“ adultery, from succeeding to the numerous honours of the petitioner’s
“ family. That in consequence of there not being any property involved
“ in the succession of the petitioner as heir to his said brother, he is
“ advised that he cannot file a bill in Chancery to perpetuate testimony ;
“ and he submits that it would be not merely an anomaly, but an injustice
“ to the families of peers, if, while the law provides means for securing
“ the rights of inheritance of the humblest person in the kingdom to every
“ kind of property, by enabling the party interested to perpetuate the
“ evidence of witnesses in case of their death, no such means should exist
“ with respect to the highest and most important right of inheritance, the
“ dignity of a peer of the realm. That the petitioner, naturally anxious
“ to secure to himself and his family the enjoyment of his and their legal
“ rights, and to prevent the same from being lost by the success of an
“ imposition so audacious as to be absolutely without precedent, never-
“ theless feels that your lordships have at least an equal interest in the
“ question. The petitioner therefore humbly submits the difficulties
“ under which he labours, and the injustice which may arise, as well to
“ their lordships and the peerage as to himself and his family, to the
“ consideration of their lordships, and prays that your lordships will pro-
“ vide such remedy and adopt such proceedings as to your lordships may
“ seem meet.”

in certain cases), it was by the first section enacted in substance, that any person who would, under the circumstances alleged by him to exist, become entitled *upon the happening of any future event* to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which could not by him be brought to trial before the happening of such event, should be entitled, from and after the passing of that Act, to file a bill in the High Court of Chancery to perpetuate any testimony which might be material for establishing such claim or right.

The second section provided for making the Attorney-General a defendant to all suits instituted under the authority of the Act, touching any honour, title, or dignity, or any other matter in which the Crown might be interested.

The chief extensions made by this Act were shortly as follow :—

First. The right to perpetuate testimony was extended to persons *claiming titles, dignities, or offices*, and not restrained as before to claims in respect of property.

Secondly. A person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of *any future event*, &c. &c., may now file a bill to perpetuate, so that the distinction adverted to as existing in Lord Eldon's time between a mere *spes successionis* and a remote interest no longer exists; and an heir at law or next of kin may equally have testimony perpetuated.

In reference to the particular case (the Townshend

Peerage) which gave rise to the Act, it is sufficient to state, that in the subsequent session, that of 1843, both the Marquis Townshend himself, and his brother the former petitioner, applied to the House, claiming its interference, notwithstanding the altered state of law under the new Act; and in the same session, under the auspices of Lord Brougham, a private Act was passed (a) enacting that the children of the Marchioness, therein mentioned, with the exception of one child, a minor, whose rights were specially saved, were not, nor should any of them be deemed, lawful issue of the Marquis. Thus, singularly enough, the particular case, to meet which the general Act was passed, never needed the assistance of it.

A few points in reference to the practice of the court in suits of this kind demand notice.

1. The depositions taken are never published until, by reason of the death of the witness, it becomes apparent that his testimony cannot, when litigation shall arise, be given in the ordinary way.

This circumstance you will frequently find commented upon in the cases, as a marked infirmity in the jurisdiction itself (b). The witness, it has been observed, gives his testimony without being under the restraint of any of those penalties which the law imposes upon perjury; for during his life the evidence is not published, and after his death human tribunals can no longer reach him. The evil was, under the old

(a) An elaborate protest against the passing of the Act was signed by Lord Cottenham and six other peers; see 10 Clark & Finnelly, 314.

(b) *Angell v. Angell*, 1 Simons & Stuart, 89.

practice, aggravated by the circumstance that cross-examination was a mere shadow, the interrogatories for cross-examination (so called) being framed without any knowledge of what the witnesses might say on their examination in chief. But it has been decided that the alterations in equity procedure introduced in 1852 in reference to taking evidence, apply to the case of examining witnesses *de bene esse* (a); and upon principle, therefore, witnesses in a suit to perpetuate testimony must either be examined *vivâ voce* before an examiner, the other side attending and giving evidence, or they must depose by affidavit, and there will then be the right of cross-examining upon the affidavit.

2. Bills to perpetuate testimony are never brought to a hearing (b); in truth, there is nothing to hear; for first, there is no issue immediately triable, and secondly, the evidence not being published, there is no evidence available. The practice is as follows: If the defendant merely cross-examines the witnesses of the plaintiff, he is entitled to his costs. If he examines witnesses of his own, then, as he has availed himself of the bill to perpetuate testimony in his own favour, he must bear his own costs (c).

The *third* subdivision of my first main division of

(a) *Cook v. Hall*, 9 Hare, App. xx.—And the Order as to evidence of the 5th February, 1861, provides (by rule 16) that in suits to perpetuate testimony, evidence shall continue to be taken according to the then existing practice. See Mr. Barber's Statement, p. xlviii.

(b) And a motion to dismiss a bill of this kind for want of prosecution is irregular. The proper application is that the plaintiff do proceed within a given time, or pay the defendant his costs; *Wright v. Tatham*, 2 Simons, 459. See further, *Ellice v. Roupell* (No. 2), 32 Beavan, 315.

(c) *Vaughan v. Fitzgerald*, 1 Schoales & Lefroy, 316.

auxiliary jurisdiction, namely, bills for the examination of witnesses "*de bene esse*," may be treated as practically defunct.

In former times, a plaintiff, who had actually commenced litigation at law, or a defendant who was actually sued there, might be under the apprehension *either* that at the time of trial important witnesses actually abroad might still be there, *or* that important witnesses of advanced years might be then dead, *or* that old or infirm witnesses might be then unable to travel. Justice required that under these circumstances the evidence of these witnesses should by some mode be taken and preserved, so as to provide against the event of its not being obtainable in the regular way at the trial.

Formerly the common law courts possessed no machinery for accomplishing this important object; and under these circumstances bills used to be filed in equity, praying a commission for the examination of witnesses. These bills resembled obviously, in their nature, bills to perpetuate testimony. But there were certain technical distinctions. Thus the bill to obtain a commission for the examination of witnesses abroad, or of aged or infirm witnesses, lay only where litigation had actually commenced (*a*). And there were distinc-

(*a*) *Angell v. Angell*, 1 Simons & Stuart, 83. On the other hand, it is a fatal objection to a bill for perpetuation of testimony, if taken at the proper time, that the matters in dispute may be made the subject of immediate judicial investigation; *Ellice v. Roupell* (No. 1), 32 Beavan, 299; *Earl Spencer v. Peek*, L. R. 3 Eq. 415. And see further, as to the distinction between "perpetuating testimony" and "examination *de bene esse*," the judgment of the Master of the Rolls in *Ellice v. Roupell* (No. 2), 32 Beavan, 308.

tions in reference to the circumstances under which publication of the evidence was permitted (a).

But there would be little advantage in dwelling upon the peculiarities of a jurisdiction now practically obsolete.

The first effort to free the common law courts from the need of the assisting hand of Equity, was that made by the India Bill of 1773 (b), which provided for taking evidence in India in reference to actions and suits of which cause arose in India. In 1830 (c), power was given to the common law courts, to order an examination upon interrogatories or otherwise, of any witnesses within the jurisdiction, and to issue commissions for the examination of witnesses out of the jurisdiction; and from this Act we may date the practical extinction of the head of *auxiliary jurisdiction*, which, in consequence, we have merely glanced at.

Secondly.—We pass now from the class of cases in which the aid of equity was afforded to supply the infirmity of the common law in respect of evidence, to that where a jurisdiction was exercised to repress needless and vexatious litigation at law, as in Bills of Peace; or to provide for a fair and sufficient trial in the proper *forum*, as in the case of bills to establish wills.

Here the jurisdiction, though “auxiliary,” in the sense that the equity court did not altogether supersede the common law jurisdiction, was exercised upon

(a) *Harris v. Cotterell*, 3 Merivale, 680.

(b) 13 Geo. III. cap. 63, s. 44.

(c) By 1 Will. IV. cap. 22, s. 1.

very different principles from those regulating the auxiliary jurisdiction in cases of the first class.

In cases of the first class the jurisdiction may be accurately termed "*ancillary*." In those of the second, equity no longer appears as the *handmaid*, but is found superintending and regulating the legal proceedings, guiding them in fact to a just and fair result.

To consider, first, "Bills of Peace."

It occasionally happens, that many persons, possessing or supposing themselves to possess some common right, find that right disputed by some other person who is in a position, if so inclined, to litigate separately at law with each of his opponents their title to the common right alleged.

Take, as an instance, the case of a manor, with several copyholders, and of a dispute arising as to the amount of the fine payable to the lord by the copyhold tenants. Here the lord might, if he chose, litigate separately with each tenant the question respecting the fine to be paid. After failure in a trial with one, he might discover new evidence, and try whether, with his additional evidence, and possibly a more favourable jury, he might not be more successful against another copyholder. And this might be repeated *ad libitum*. The only check would be, the increased probability of defeat after every new failure, and the correspondingly increasing probability of having to pay costs. On the other hand, the vexation might proceed from the tenants, who might *seriatim* and in detail harass the lord after repeated failures on their part.

In a case of this kind, equity supplies a remedy

by what is called a *Bill of Peace*. Either the successful tenants may file their bill against their litigious lord, or the successful lord against his litigious tenants, claiming to have the right ascertained and quieted.

In reference to this jurisdiction, the case of the *Mayor of York v. Pilkington* (a) is especially instructive as being only just within the boundary-line which separates cases fitted for a Bill of Peace from those which are not. In fact, you will find Lord Hardwicke was at first of opinion that the bill would not lie in the particular case, and subsequently that it would.

The bill was filed by the corporation of York, claiming a sole right of fishery over a large tract of the river Ouse, against the defendants, who claimed several rights either as lords of manors, or occupiers of the adjacent lands. Lord Hardwicke at first thought that there was not a sufficient community of right between the defendants to make the case suitable for a bill of peace, the defendants not all claiming or defending in the same character, as where you have tenants of a manor on the one side and lord on the other; parishioners, in the old tithe suits, on the one side, and parson on the other. And upon this ground he, in the first instance, allowed a demurrer to the bill. Subsequently the demurrer was set down to be reargued, and his Lordship held that the existence of one general right claimed by the plaintiffs was sufficient to sustain the bill, although the defendants

(a) 1 Atkyns, 282.

might make distinct defences; and the demurrer was ultimately overruled (a).

It may be observed that bills of peace have, of late years, become exceedingly rare; though previously to the Statutes for the Commutation of Tithes, this class of bill occurred frequently in the shape of a suit, either by a parson to establish his right to tithes, or by parishioners to establish a *modus*. Occasions may, however, even at the present day, occur, when a bill of peace would be a fitting step. You will find in "Van Heythuysen's Equity Precedents" (b) a form of a bill, the object of which was to obtain the benefit of former decrees, fixing all the inhabitants of a particular district with a liability to grind their corn at a particular mill.

But, besides the cases which we have just been considering, where the opportunity for vexatious litigation arises out of the number of claimants on one side, there is another in which, although the parties litigant be merely A on the one hand and B on the other, trial after trial may be had, subject only to the check imposed by the fear of having to pay costs. I allude to proceedings in ejectment.

The action of ejectment was, if you recollect, origin-

(a) In a recent case, where a person claiming to be the owner of a patent had filed 134 bills against different defendants, Lord Westbury, L. C., directed the validity of the patent to be tried as against three selected defendants, representing different classes of alleged infringers, thus virtually giving the defendants the benefit of a bill of peace against the alleged patent owner; *Foxwell v. Webster*, 10 Jurist (N.S.), 137; 4 De Gex, Jones, & Smith, 77.

(b) Vol. i. p. 611; see the decrees at pp. 614, 622.

ally a convenient invention for trying the title to land without the formality of a real action. Thus Jones claimed the freehold against Thompson, the latter being in possession. The following fiction was supposed:—

Jones, the claimant, was treated as having entered upon the land, and as having, after entry, made a lease to Doe. Next, it was supposed, that while Doe was on the land, claiming under the lease; Roe, claiming title under Thompson, the person really in possession, had come and turned Doe out. Roe was called the casual ejector.

To seek redress for this imaginary wrong, an action was commenced in the name of Doe against Roe. Doe, on the demise of Jones—the real claimant—against Roe(*a*) was the title of the action. Notice of this action was given to Thompson, who was let in to defend on the terms of his admitting all the fictitious suppositions, viz., that Jones had leased to Doe, that Doe had entered, and that Roe had turned Doe out. To use the ordinary phraseology, the real defendant, Thompson, had to confess *lease*, *entry*, and *ouster*. In its subsequent stages, the suit proceeded so as to try the real point between Jones and Thompson; and ultimately there was a verdict for or against Doe, as the case might be.

Now, although generally the courts of law moulded this fictitious action so as to work effectual justice, we find here and there curious anomalies flowing from the fiction which it involved. Thus, for instance, although the sovereign cannot, as you know, sue or be sued in

(*a*) Doe *dem.* Jones *v.* Roe.

his own court, yet he might maintain an ejectment—for the ejectment would be brought in the name of Doe, or Goodtitle, as lessee; and the lessee of the sovereign must needs have his remedy as well as other lessees. Accordingly, in the thirteenth volume of Meeson and Welsby's Reports, you will find a case of Doe *dem.* William IV. *v.* Roberts. Again—and it is with this anomaly we are here concerned, since the plaintiff was Doe, Goodtitle, or some other imaginary person—if one ejectment failed, another might be brought immediately after, and a third and fourth, and so on, *ad infinitum*. For the new plaintiff was not, in legal contemplation, the same person as the one who had failed in the former action. Any name might be selected for the imaginary plaintiff. The only check at law upon repeated and vexatious ejectments was the practice adopted by the common law courts of staying summarily a fresh ejectment until the costs in the former action had been paid; a restraint obviously inadequate to meet the real justice of the case. Under these circumstances, the equity courts, in cases of repeated and vexatious ejectments, when the right had been sufficiently tried, took upon themselves to interfere and stay further litigation.

This branch of jurisdiction cannot be said to have been finally settled until the case of the *Earl of Bath v. Sherwin (a)*, which is a leading case on the subject.

There the plaintiff's title had been established in five successive ejectments, and he brought his bill for a perpetual injunction, and to stay the defendant

(a) Precedents in Chancery, 261.

bringing any more ejectments, and to put his title in peace.

Lord Cowper, on the original hearing before him, after observing in his judgment upon the jurisdiction assumed by the court in cases arising between lords of manors and tenants, said :—

“ If in case the right between the lord and the several
“ tenants was to be settled in separate actions, the diffi-
“ culty upon the lord would be insuperable, by reason
“ of the multiplicity of suits at law; the like in settling
“ boundaries, &c.: therefore this court will interpose
“ and direct an issue to be tried; and the conscience
“ of the court thereby informed and satisfied, this court
“ will then put the whole in peace by a perpetual
“ injunction.

“ But this case,” he said, “ was in its nature new,
“ and did not fall under the general notion of a bill of
“ peace, this being only between A and B, and one man
“ is able to contend against another; and if the courts
“ of law on new demises will not suffer the former
“ verdicts to be pleaded, he could not help it: he said
“ he was satisfied of the vexatiousness of the defendant
“ in this case: but if it was a grievance, it was in the
“ law, which was proper for another jurisdiction, viz.,
“ the parliament, to reform; and that it would be
“ arrogance in him by decrees or injunctions to take
“ upon him the reformation of the law.”

However, the House of Lords, upon appeal from Lord Cowper's decision, took a different view, and granted an injunction (*a*).

(a) 4 Brown's Parliamentary Cases, 373.

Now, with reference to bills of this last class, the Common Law Procedure Act of 1852 (*a*), though consigning Doe and Roe to the grave, has retained the anomaly derived from their former existence ; I mean the non-conclusiveness of the action of ejectment ; the 207th section of the Act expressly providing, “ That “ the effect of a judgement in an action of ejectment “ under that Act should be the same as that of a judge- “ ment in the action of ejectment theretofore used.” The Procedure Act of 1854 (*b*) has somewhat improved the position of persons harassed by repeated ejectments, the 93rd section enacting that a person bringing a second ejectment after a prior unsuccessful one, may be ordered to give security for costs. But subject to these restrictions the right to bring repeated actions still exists, and the auxiliary jurisdiction of equity to quiet titles against vexatious ejectments must therefore be regarded as still needful and in force (*c*).

Of the heads of auxiliary jurisdiction mentioned by me at the outset, “ Bills to Establish Wills ” alone remain.

There is, perhaps, hardly any portion of our judicial machinery which affords less ground for satisfaction than that which has been provided, or rather suffered to exist, for the litigation of matters testamentary.

Let us first consider the state of the law as it stood previously to the Act of last session (*d*).

(*a*) 15 & 16 Vict. cap. 76.

(*b*) 17 & 18 Vict. cap. 125.

(*c*) And generally if there be a defence in equity it can be made available only by bill, as there can be no equitable plea in an action of ejectment, *Neave v. Avery*, 16 Common Bench Reports, 328.

(*d*) *i.e.*, 20 & 21 Vict. cap. 77, passed in the session previous to the delivery of the Lectures.

When, upon the death of a person, a document is produced purporting to be his will, two questions obviously arise. First, is the document really and legally his will? that is, was it really executed by him when of sound understanding, and with full knowledge of its contents? and is it executed and attested in the manner required by law? Secondly, what is the meaning of the document itself? We have the question of "*Factum*," and the question of "*Construction*."

Now, in reference to both these questions, the jurisdiction was altogether until the late Act (a), and indeed still remains to a considerable extent, different according as the property affected by the will was or is real or personal estate.

We will take *Personal Estate* first.

In the earliest ages of our legal history, if a man died intestate, the bishop or ordinary used to take possession, either of the whole or of the disposable portion, as the case might be, of his personal estate; and apply the same for the spiritual benefit of the soul of the departed, and the temporal advantage of Holy Church (b). Hence, where a deceased person had made a will, it was natural that it should be produced to the "ordinary," that he might be satisfied on that point; and this no doubt was the source of the testamentary jurisdiction of the ecclesiastical courts, which thus

(a) 20 & 21 Vict. cap. 77.

(b) The statute of the 13th Edward I. stat. i. cap. 19, first compelled the ordinary to pay the deceased's debts; and that of the 31st Edward III. cap. 11, first took the administration from the ordinary, and gave it to the next of kin.

became, and until the late Act continued to be, the proper tribunals for determining the *factum* of the will, so far as related to the *personal estate* affected thereby.

Next, as to *construction*. The Ecclesiastical Court had no power to put a construction on the will, except so far as might be necessary for determining to whom probate or administration with the will annexed should be granted. The function of construing wills, so far as related to *personal estate*, devolved on the equity courts, and still remains with them as part of their jurisdiction in reference to the administration of the estates of testators and intestates; a head of exclusive jurisdiction which was touched upon in my fourth lecture.

Secondly. As to *Real Estate*. Here, subject only to the qualified interposition of the equity courts, which will be presently explained, the common law court, and the jury, each acting within its fitting province, were alone the judges both of *factum* and *construction*. The question of will or no will was tried before a jury at Nisi Prius. Questions of construction were decided by the court in Banc. With the question of *factum*, the Ecclesiastical Court had here no concern. No investigation in that court, however elaborate in reference to the *factum* of the will, could in the slightest degree govern or affect the rights of those claiming the real estate of the deceased, either under or against his will.

The anomaly of the double jurisdiction was less glaring before the Wills Act of 1837 (*a*), because the Statute of Frauds (*b*) had imposed special formalities

(*a*) 1 Vict. cap. 26.

(*b*) 29 Car. II. cap. 3, s. 5.

of execution and attestation in regard to wills of real estate, while none such were required in reference to wills of personalty. Yet even then, after a protracted litigation in the Prerogative Court, and before the court of delegates, upon the question whether a testator was of sound mind, and after a decree actually pronounced deciding him not to be so, and recalling probate on that ground, it was open to a devisee claiming under the same instrument to contend that the deceased was of sound mind, and the will a good will. I have myself known a learned conveyancer hesitate to accept a title of real estate derived under an heir, though his ancestor's will had been set aside in the Ecclesiastical Court, after twenty-five years of celebrated litigation.

But when Lord Langdale's Act had subjected wills, both of personal and real estate, to the same forms of execution and attestation, the divided jurisdiction shocked common sense more strongly. That first a learned judge of the Prerogative Court, and afterwards, on appeal, the Judicial Committee of the Privy Council, should solemnly determine a will to be well executed and attested so as to bind personal estate; and that the whole matter should be open to new litigation in the common law courts as respected realty, seemed an outrage on administrative justice.

Such, previously to the recent Act (a), was the state of testamentary jurisdiction; and it will be more convenient if, before adverting to the Act itself, we point out the nature of the chancery jurisdiction, in regard

(a) *i.e.*, 20 & 21 Vict. cap. 77.

to "*establishing wills*,"—the head of auxiliary equity under consideration.

Under the state of law which we have above slightly sketched out, a devisee of real estate had, apart from the interposition of equity now to be explained, no power to take active steps to establish the validity of the will under which he claimed. Until the heir chose to dispute the will, he (the devisee) could only remain passive. The heir might lie by until the evidence in favour of the will was partially lost by death or otherwise. There was no court to which the devisee could go like the executor or residuary legatee, and say, "decide upon the *factum* of this will."

Under these circumstances, Chancery lent its aid; and the devisee might obtain its assistance in two different ways.

First, he might file a bill against the heir in the nature of a bill for perpetuating the evidence of the testator's soundness of mind, and of his execution of the will;—a kind of bill which, in technical language, was commonly called a bill to prove the will *per testes*. The witnesses to the will were examined as to the testator's sanity, and the fact of execution; and the cause, like other causes for the perpetuation of testimony, was never brought to a hearing; though, *unlike* ordinary causes of this description, the witnesses' depositions were published at once (*a*). This process was commonly called proving a will in Chancery.

(*a*) This was expressly so stated by Graham B. in the case of *Harris v. Cotterell*, 3 Merivale, 680, where the practice as to publication was care-

Secondly. The devisee might file a bill against the heir seeking to have the will established, *i. e.*, unless the heir waived an issue, to have the validity of the will tried before a common law jury upon an issue of "*Devisavit vel non.*" In this case the Court of Equity retained the bill until the question of its validity had been determined in an issue, reserving to itself the power, if it thought expedient, of directing a second or even a third trial of the issue; and finally by its own decree established the validity or invalidity either of the will generally, or of any particular devise, and thus quieted further litigation.

You will hear with some surprise, however, that it was reserved for these recent times to ascertain and determine the precise nature of the jurisdiction of the Court of Chancery in reference to "*Bills to establish Wills.*" It is only four years since, that in the case of *Boyse v. Rossborough* (a), Vice-Chancellor Wood, after reviewing in the most elaborate manner the whole history of this branch of jurisdiction, decided that a bill of this species could be maintained by a devisee of the legal estate against the heir, although the latter had brought no ejectment. It was argued strenuously that some circumstance, either of trust or of disturb-

fully considered. Vice-Chancellor Wood, in his elaborate judgment in *Boyse v. Rossborough*, Kay 71 (see p. 102), seems to have considered there was no difference between the practice as to publication of depositions in this class of bill, and that which was observed in reference to ordinary bills to perpetuate testimony.

(a) Kay, 71; on appeal, 3 De Gex, Macn. & Gor. 817. There was an appeal to the House of Lords, but the judgment of the Court of Appeal was submitted to without argument, 3 Jurist (N.S.), 373.

ance by the heir, was necessary to support such a bill; but the Vice-Chancellor decided that, both upon principle and authority, there was an inherent equity on the part of the devisee, whether legal or equitable, arising from the mere fact of the devise, to have the will established against the heir (a). You will find in the Vice-Chancellor's judgment such a complete review of the whole question, that I am the less concerned at the meagreness of my statements here.

Let us now consider the effect of the Act of last session (b), which has just come into operation. By that Act a new court, called the Court of Probate, is established, to which all the old testamentary jurisdiction of the Ecclesiastical Courts is transferred.

In reference to real estate, the material sections are the sixty-first and the sixty-second. The former of these provides in substance that where proceedings are taken to prove a will in solemn form, or to revoke a probate already granted, all persons interested in the real estate affected by the will, such as heirs, devisees, &c., shall be cited (c). The latter provides, that where the will is proved in solemn form, or its validity other-

(a) And a devisee is equally entitled to have the will under which he claims established in equity, not only against the heir, but against all persons setting up adverse rights; as, for instance, persons claiming under a prior will, and disputing the validity of the later one; *Lovett v. Lovett*, 3 Kay & Johnson, 1. But the heir has no correlative right to file a bill in Chancery against a devisee to set aside a will on the ground of fraud; *Jones v. Gregory*, 33 Law Journal (N.S.), Chanc. 679; s. c. 4 Giffard, 468; 2 De Gex, Jones, & Smith, 83.

(b) 20 & 21 Vict. cap. 77.

(c) See *Lister v. Smith*, 3 Swabey & Tristram, 53.

wise established in the Court of Probate, the decree of the court shall be binding on the persons interested in the real estate.

Under these sections, therefore, when the *factum* of a will has been once solemnly determined in the Court of Probate, it will be determined finally as respects real as well as personal estate. It is to be observed, however, that it by no means follows that all questions respecting the *factum* of testamentary instruments will, as respects real estate, be in future determined in the Court of Probate. Cases may yet occur where a will may be proved in common form in the Court of Probate; and the heir alone being interested in disputing its validity, the validity may be first questioned in an action of ejectment (*a*).

We may, indeed, have the following events occurring :—

First. Probate in common form.

Secondly. Litigation in ejectment, calling in ques-

(*a*) Thus, for instance, a testator dies, having by his will, the validity of which is doubtful, devised his real and personal estate (the former of which descended to him *ex parte paternâ*), upon trust to sell and convert and pay the net proceeds, in unequal shares, amongst his half-brothers and sisters *ex parte maternâ*, who are his next of kin. Here assuming the real estate to be large in proportion to the personal estate, it may be the interest of all the next of kin, including those who take the smaller shares, to support the will; which therefore may very likely be proved in common form. Then upon the heir *ex parte paternâ* litigating the validity of the will as to real estate in the common law court, and succeeding, it will become the interest of those of the next of kin who take the smaller shares to set aside the will as to the personal estate; and this, if resisted by the other next of kin, may lead to a second litigation in the Probate Court. Again, at first, the personal estate may be thought trifling, and after litigation at law valuable personalty may be discovered.

tion the testator's sanity, or the genuineness or valid execution of the alleged will.

Thirdly. The question of sanity, genuineness, or validity of execution, litigated a second time in the Court of Probate.

For although after the heir has been cited in the latter Court the decision there will bind him elsewhere, the decision of the common law court, as between the heir and person claiming as devisee, can have no effect in the Probate Court as between those claiming the personal estate under the will and the next of kin.

The prospect of a different *final* result, in respect to the operation of a will upon realty and personalty, is no doubt somewhat remote; the appellate jurisdiction, in reference to wills of personal estate, having by the late Act (*a*) been transferred from the Judicial Committee of the Privy Council to the House of Lords; to which latter therefore the ultimate appeal now lies, in respect to wills of both species of property. Considerations of expense might, however, where the property is small, preclude an ultimate resort to the House either from one or from both of the subordinate tribunals respectively entitled to adjudicate, and thus leave conflicting decisions on record; and, on the whole, it cannot be said that the Act has done more than mitigate the inconveniences of the double jurisdiction.

As respects the head of equity now under consider-

(*a*) 20 & 21 Vict. cap. 77, s. 39.

ation, "*Establishing Wills*," that must, to a great extent, still prevail.

When the will has been merely proved in common form, the devisee will have no power under the Act of provoking the exercise of the contentious jurisdiction of the Court of Probate, and he will remain in the same position as he was under the old state of law. If harassed by the heir, a bill to establish the will will obviously be his simplest course; if in quiet possession, but wishing to establish his title while the evidence is at hand, he must still, unless he can through the friendly assistance of some next of kin bring about a contentious litigation in the Court of Probate, resort to the Court of Chancery as heretofore.

LECTURE VII.

MY selection of the wife's separate estate for consideration as a particular instance of the exclusive jurisdiction of the Court of Chancery is easily justified. In fact, I may well be allowed a preference in favour of what has worked for good; and seldom has the creative, nay, almost legislative jurisdiction of the Court, been exercised more beneficially than in building up the doctrines relating to the wife's separate estate. It is no small merit to have gained for married women that capacity of holding property and of contracting which the law denied them, and to have rescued the jurisprudence of our country from the imputation of barbarism under which it must otherwise have lain. Notwithstanding however what has been done for the ladies by our equity jurisprudence, I apprehend that they commonly refer to it with less affection than energy. They speak often, I am afraid, of that "horrid Court of Chancery," little knowing—and in their want of knowledge lies their excuse—what they owe to it, and to the equally horrid lawyers with their long deeds.

But the selection of the wife's separate estate recommends itself by other considerations. Amongst these

may be mentioned the circumstance that the equitable doctrines relating to the separate estate are of such recent origin, that their birth and growth can be traced with far greater distinctness than those of almost any other head of equity. The earliest commencement indeed of the separate estate cannot be carried more than two hundred years back; and the final settlement of some of the more important of its doctrines was, as we shall presently see, reserved for the chancellorship of Lord Cottenham. Lastly, at the present time, when everything which pertains to the relation of "*husband and wife*" is canvassed and criticised with the greatest minuteness, and when the approach of a struggle to place that relation on a different footing in regard to property is clearly discernible (*a*), the consideration of the wife's separate estate commands especial interest.

I propose dealing with the subject of my lecture in the following order, viz. I shall consider :—

1. The general doctrines of the Court respecting the *Separate Estate* and its modern adjunct, *Restraint on Anticipation*.

2. By what acts *inter vivos* the wife may alienate or affect her separate estate.

3. The wife's *testamentary power* over her separate estate.

4. The *devolution* of the separate estate where

(*a*) The struggle has since taken place, and its first fruits are to be found in the Married Women's Property Act, 1870, of which a summary is given pages 119, 120, *ante*, but which affects only in a very minute degree the points discussed in this lecture.

the wife has neither aliened it in her lifetime nor disposed of it by testamentary instrument ; and

5. I shall make some special remarks respecting separate estate in *freehold* property.

At the same time I propose, so far as possible, treating my subject historically. It is probably true that in the study of our equity system (built up as it has been bit by bit) the chronological method is generally the soundest ; but certainly no one can be said to possess the master-key to the understanding of the doctrines of the separate estate who is ignorant of their history.

1.—As respects the general doctrines. At law the husband upon marriage became entitled to an estate during the joint lives of himself and his wife in his wife's freehold property, which estate upon birth of issue was enlarged into one for his own life—the estate by the curtesy. His wife's personalty became *his* absolutely, subject only to the necessity for reduction into possession spoken of in my fourth lecture (a). The wife, on the other hand, was after her husband's death entitled to dower, or to her jointure when a jointure had been provided in lieu, and also to a share of his personal estate ; but the notion of conferring upon her any rights of property *during the marriage*, was alike foreign to the principles of the common law and to the general feelings of our ancestors.

The only exception that I am aware of was in the case of the queen consort. Of her, Lord Coke says in his Commentary upon Littleton (b) : “ But by the

(a) p. 118, *supra*.

(b) Coke Litt. 133 a.

“ common law, the wife of the King of England is an
 “ exempt person from the king, and is capable of lands
 “ or tenements of the gift of the king, as no other
 “ *feme covert* is, and may sue and be sued without the
 “ king; for the wisdom of the common law would
 “ not have the king (whose continuall care and study
 “ is for the publike, *et circa ardua regni*) to be
 “ troubled and disquieted for such private and petty
 “ causes : so as the wife of the King of England is of
 “ ability and capacity to grant and to take, to sue and
 “ be sued as a *feme sole* by the common law.”

The earliest instances of conferring anything in the nature of separate property upon the wife during the coverture were, to the best of my research, those in which, upon a separation between husband and wife by agreement, a separate maintenance was secured to the latter. Such were the cases of *Sanky v. Goulding* (a), decided in Queen Elizabeth's reign

(a) Cary's Rep. 124, Edition 1820. This is the earliest reported case that I have hitherto met with recognising a separate maintenance. I transcribe it verbatim :—

“ The plaintiff setteth forth in her bill that she joined with her husband
 “ in sale of part of her inheritance, and after some discord growing betweene
 “ them they separate themselves ; and one hundred pound of the money
 “ received upon sale of the lands was allotted to the plaintiff for her
 “ maintenance, and put into the hands of *Nicholas Mine*, Esquire, and
 “ bonds then given for the payment thereof unto *Henry Golding*, deceased,
 “ to the use of the plaintiff ; which bonds are come to the defendant, as
 “ administrator to the said *Henry Golding*, deceased, who refuseth to
 “ deliver the same to the plaintiff, and hereupon she prayeth reliefe ; the
 “ defendant doth demur in law, because the plaintiff sueth without her husband ; and it is ordered the defendant shall answer directly. *Mary Sanky*
 “ alias *Walgrave* plaintiff, *Goulding* defendant. Anno 21 & 22 Eliz.”

The wife's, or perhaps one ought to say the widow's, right to her *paraphernalia*, was recognised as early as the 26th Eliz. See Viscountess

about 1580, and of *Gorges v. Chancie* in the 15th Charles I., 1640 (a).

Next, so far as I can judge, came cases in which, pursuant to ante-nuptial agreement, a term in lands was limited to trustees upon trust to pay the rents and profits to the wife for her separate use during the coverture.

In "The Perfect Conveyancer," printed 1655, a book of precedents of considerable authority, I find no notice of any provision in favour of a married woman beyond limitations of jointures; but in the collection which we owe to the pen of Sir Orlando Bridgeman, who adhered to the royal party and practised only conveying during the commonwealth, you may see a precedent of a limitation of a term to trustees upon trust for the separate use of a married woman, which in fullness and accuracy of language is hardly surpassed by our modern forms (b).

It purports to be a demise after marriage by a husband and wife, in pursuance of an agreement entered

Bindon's Case, 2 Leonard's Reports, 166, placitum 201. But this right is, in its essence, different from that of the *separate estate*, as having no permanent vitality *during the coverture*; since the husband may sell or give away the wife's *paraphernalia* during his lifetime; though if he merely pledge them, the widow is entitled to have them redeemed out of his general personal estate: see *Seymore v. Tresilian*, 3 Atkyns, 358; *Graham v. Londonderry*, 3 Atkyns, 393.

(a) Referred to at Tothill, edit. 1649, p. 97; edit. 1671, p. 161; and more fully at 1 Cases in Chancery, 118. There is a kind of intermediate case of separate maintenance mentioned at Tothill, edit. 1649, p. 94; edit. 1671, p. 158 (*Fleshward v. Jackson*, 21 Jac.), where there had been no separation apparently, but the husband is stated to have been an *unthrift*.

(b) Bridgeman's Precedents, edition of 1682, p. 118; somewhat singularly, the precedent is repeated verbatim at p. 125.

into before marriage, unto trustees for the term of sixty years, if the husband and wife shall both of them jointly so long live. The principal trust is as follows:—" Upon such trust and confidence, nevertheless, as is hereinafter mentioned, that is to say, that " they the said [*trustees*], their executors, administrators, and assigns shall, from time to time, during " the said term, employ and dispose of all and singular " the premises hereby demised, to and for the sole, " proper, peculiar and separate use, benefit and maintenance of the said [*wife*], and not for the use or " benefit of the said [*husband*], nor as he shall direct ; " but shall from time to time, and at all times during " the said term, pay, employ, and dispose of all the " moneys to be had, levied, or raised out of the said " premises (other than such moneys as shall be, from " time to time, expended in managing and performing " the trust hereby reposed, which it shall and may be " lawful for them, from time to time, to deduct), into " the proper hands of the said [*wife*], or into the " hands of such person as she shall, from time to " time, alone without the said [*husband*], by any " writing or writings by her signed with her own " hand, appoint the same to be paid, and not otherwise."

Then follows a stipulation not to dispose of the moneys to the husband, a proviso that if the husband be liable for any debts of the wife the trustees shall pay them, and covenants for title.

This precedent, penned as it probably was some two hundred years ago—for the author of it became Chief

Justice of the Common Pleas a few months after the Restoration of 1660, and presumably did not prepare drafts after that date—is certainly a remarkable instance of advanced conveyancing skill; and it may perhaps be regarded as the legitimate ancestor of our present pin-money forms—just as Sir Orlando himself has been called the father of conveyancing—though the word “pin-money” does not once occur in it. Be this as it may, a separate allowance to a wife during marriage for personal expenses may claim an antiquity of some two hundred years.

In reference to the precise date of the origin of the separate estate in the larger sense, as extending beyond a mere personal allowance, that may be fixed some time between the years 1668 and 1705. At the earlier of those dates we find it attempting to struggle into existence in the form of an ante-nuptial contract by the husband with the wife, and foiled in its efforts by the very Sir Orlando Bridgeman (then Lord Keeper) who penned the form to which I just now called your attention. I refer to the case of *Pridgeon v. Pridgeon* (a). In that case the plaintiff, the wife of Sir Francis Pridgeon, suggested that the latter before his marriage agreed with her, *and others on her behalf*, that notwithstanding her marriage, “the rents and profits of all her own estate and what personal estate and goods she had should be at her own disposal.” Final judgment does not appear to have been given; but the Court intimated its view to be that, “where an agreement between *baron* and *feme* is to have

(a) 1 Cases in Chancery, 117.

“ execution during the coverture, the marriage extinguisheth such an agreement ;” a result which I may observe was not only unsound, as importing into equity a mere technical rule of law, but difficult to sustain upon the agreement stated, which is said to have been not merely with the wife, but *with friends on her behalf*. Sir Orlando, however, though the most eminent of conveyancers, was admittedly but ill acquainted with equity doctrines.

At the later date (1705), we find, on referring to the case of *Gore v. Knight* (a), that the separate estate, at least under the guise of a *power* reserved to a married woman before her marriage to dispose of her personal estate by deed or will, was then fully recognised.

The precise mode in which in this particular case the power was reserved does not appear ; but the whole tenor of the report shows that a separate estate in the corpus of property was then known to the equity courts. It may, however, be fairly inferred from a number of the *Spectator* (the 295th, one of Addison's), to which the attention of the legal world was first called by a most entertaining note to Lord St. Leonards' treatise on the Law of Property, as administered by the House of Lords (b), that at the time when the number was written (and it bears date some seven years later than the decision in *Gore v. Knight*) the separate estate was by no means in general usage ; and the views put forward by Addison may perhaps be accepted as not unfairly reflecting the general disfavour

(a) 2 Vernon, 535.

(b) Vide page 165.

with which separate provisions for wives were at first regarded.

In the article referred to, an imaginary correspondent of the *Spectator* (Mr. Josiah Fribble), after detailing the circumstances under which he agreed to pay his wife 400*l.* a year for pin-money, and his domestic miseries flowing therefrom, says, "I hope, sir, you will take occasion to give your opinion upon a subject which you have not yet touched, and inform us if there are any precedents for this usage among our ancestors, or whether you find any mention of pin-money in Grotius, Puffendorff, or any other of the civilians." Upon this fictitious provocation the *Spectator* proceeds to give his opinion freely against pin-money, the following being his opening observations: "As there is no man living who is a more professed advocate for the fair sex than myself, so there is none that would be more unwilling to invade any of their ancient rights and privileges; but as the doctrine of pin-money is of a very late date, *unknown to our great-grandmothers, and not yet received by many of our modern ladies*, I think it is for the interest of both sexes to keep it from spreading."

Thus much for the *Spectator's* opinions respecting the general propriety of separate provisions in the shape of pin-money. The inference that the separate estate in the general sense could hardly have been in general use at the time when Addison wrote, is derivable rather from the tenor of the whole article than from any particular passage. Throughout the whole

essay, which treats the mere existence of a separate allowance as objectionable on the general principle, “that separate purses between man and wife are as “unnatural as separate beds,” we find not a single allusion to any practice, either established or incipient, of reserving to the wife a power of disposition over her own property. Had any such course been otherwise than rare, it would probably have been alluded to by the *Spectator*, in his *quasi* judicial observations, as equally objectionable with pin-money.

The general result, then, of my research may be thus stated:—First in order of antiquity came *maintenance* to a wife separated from her husband; then an allowance for personal expenses during marriage, or *pin-money*; and last of the three, *separate estate* generally, though under the guise in the first instance of a power.

We pass now to the next step in the history of the separate use, namely, its establishment independently of any agreement with the husband. The earliest instances of “separate estate” are undoubtedly those in which the privilege was obtained through the medium of an express contract by the husband. It would seem further to have been admitted, early in the history of the separate estate, that by interposing a trustee, property might be given for the separate use of a married woman without any contract on the part of the husband. But suppose property given to the wife herself, with a direction that it should be for her separate use. What then was the result? It was suggested that the property became the wife’s, and,

through her, her husband's, and that *he* was bound by no agreement. The answer was clear—the separate estate was a species of trust—the trust should not fail for want of a trustee—if the husband took any legal interest, he would hold it as trustee for his wife. You will find the doubt raised by Lord Chancellor Cowper in 1710 (*a*), and disregarded in 1725 by the then Master of the Rolls, Sir Joseph Jekyll (*b*); since which case it has, I believe, never been put forward.

You will however of course bear in mind, that where no trustees are interposed, the *legal* rights of the husband and of those claiming through him remain unaffected, so that *at law* chattels personal to which the wife is entitled for her separate use may be taken in execution for the husband's debt (*c*). Equity will, however, in these cases interpose and protect the wife (*d*).

Passing on now some seventy years or so, we reach a most important epoch in our history—that, namely, of the invention of the clause restraining the married woman's power of anticipation. It had by that time become apparent that the absolute power of disposition given to the married woman over her separate estate was really a fatal gift. Her husband, in many instances

(*a*) *Harvey v. Harvey*, 1 Peere Williams, 125.

(*b*) *Bennet v. Davis*, 2 Peere Williams, 316.

(*c*) This statement must now be qualified so far as respects chattels made separate property by the Act of 1870, as to which the 11th section (see p. 119, *ante*) gives the married woman the same remedies, both civil and criminal, in her own name as if she were unmarried. As to such chattels she may therefore, it is conceived, proceed by way of interpleader at law.

(*d*) *Newlands v. Paynter*, 4 Mylne & Craig, 408.

by undue influence, in some possibly by threats, induced or compelled her to dispose of her separate estate in furtherance of his own selfish views. At last a case occurred which forcibly directed attention to the unsatisfactory state of the law. I mean *Pybus v. Smith (a)*.

In that case the question arose upon the post-nuptial settlement of a female ward of the Court of Chancery (a Mrs. Vernon) which had been executed in pursuance of a decree of the Court. By the settlement, which bore date May 1785, real estate had been vested in trustees upon trust during the wife's life, to pay the income as the wife should *from time to time appoint*, and in default for her separate use, and there was a similar trust as to the dividends of a sum of stock, excepting that the words "*from time to time*" were omitted in the power. In August 1785, the wife joined in incumbering her life interest. The incumbrancers filed their bill to have the benefit of their security. The nature and result of the suit is thus graphically described by Lord Eldon (b). "So in "*Pybus v. Smith*, the Court settling the property (c), "with all the anxious terms then known to conveyancers, in a day or two afterwards, while the wax "was yet warm upon the deed, the creditors of the "husband got a claim upon it by an informal instrument; and the same judge who had made such "efforts to protect her (meaning Mrs. Vernon, the

(a) 1 Vesey Jun. 194; 3 Brown's Ch. Ca. 340.

(b) *Jones v. Harris*, 9 Vesey, 493.

(c) His Lordship here alludes to the settlement of 1785.

“ wife) was upon authority obliged to withdraw that “ protection.” In fact, Lord Thurlow, after struggling hard to extract from the words “ from time to “ time ” a fetter on alienation, held that he was bound by the decisions.

However, in delivering judgment in *Pybus v. Smith*, Lord Thurlow expressed his opinion to be, “ that “ if it was the intention of a parent to give a provision to a child in such a way that she could not “ alienate it, he saw no objection to its being done ; “ but such intention must be expressed in clear “ terms ” (a). And subsequently, on becoming a trustee of Miss Watson’s marriage settlement, he directed the words “ *and not by anticipation* ” to be added to those of the ordinary separate use clause : and the binding effect of the addition has never since been doubted.

The next epoch in the history of the *separate estate* was the decision in *Tullett v. Armstrong*, a decision finally setting at rest a series of questions, resulting mainly from the invention of the restraint on anticipation, which required some forty years for their complete solution, and which must be noticed before touching the case itself.

In considering the effect of any given clause conferring the separate estate with restraint on anticipation, the first question of course was, and still is, to ascertain whether the separate use and restraint were in terms limited to some particular coverture, or were intended to apply generally to every marriage.

(a) 3 Brown’s Ch. Ca. 347.

This must occasionally be a matter of some difficulty (a).

But further, where the clause was *general* in its scope, various difficulties presented themselves. Thus, suppose property limited to the separate use of an unmarried woman, independently of *any* husband whom she might marry, with a restraint on anticipation; what were her rights in such a case? Would the separate use with its attendant restriction arise upon a future marriage, in despite of the *feme*? or had the *feme* power to alien while *sole*? This was a difficulty entirely due to the introduction of the restrictive clause, since, under a limitation to her separate use simply, the wife would have a right of alienating upon either view. It was decided that the *feme* had an absolute right of alienation. The restraint on anticipation was a fetter on the general rights of property which equity would allow in the case only of a married woman. The gift was therefore equivalent to an absolute gift, subject to a modification which the law did not suffer in the case of a *feme sole*, and she might therefore dispose of the property (b).

Again, where the gift to separate use with restraint was in favour of a married woman whose husband subsequently died, the same question arose as to the rights of the widow. It was held in this case also,

(a) See, as instances, *Gaffee's Settlement*, 7 Hare, 101, and on appeal, 1 Macn. & Gor. 541; *Moore v. Morris*, 4 Drewry, 33; and *Hawkes v. Hubback*, L.R. 11 Eq. 5.

(b) This was so decided by Lord Brougham, in *Woodmeston v. Walker*, 2 Russell & Mylne, 197; and *Browne v. Pocock*, 2 Russell & Mylne, 210, overruling Sir John Leach's decisions to the contrary.

upon similar principles, that upon the coverture ceasing the restraint ceased also, and that the widow might alienate as she thought fit (a).

But a third and still more important question remained, one which might at any time have arisen in reference to the separate use alone, previously to the introduction of the restrictive clause, but which, after its introduction, became of far greater importance. It was this: In the case of a gift to the separate use, either with or without restraint on anticipation, so expressed as to be applicable to any marriage with any husband, what were the rights of a first husband where the donee, being a *feme sole*, married without exercising her power of alienation? And again (which was substantially the same point), what were the rights of a second husband where the donee, being a *feme covert*, became a widow and remarried without having alienated during her widowhood?

Taking first the case of a gift to the separate use simply, the opinion of Lord Cottenham originally was, that when the estate and interest of the *feme* had once become absolute, either in consequence of her being unmarried or of the coverture being determined by the husband's death, the quality of separate property could not, upon a subsequent or second coverture, be revived. This was the effect of his judgment in the case of *Massey v. Parker* (b), which for some four years

(a) See *Jones v. Salter*, decided by Sir William Grant, some fifteen years before Lord Brougham's decision in *Woodmeston v. Walker*, but reported in the same volume, 2 Russell & Mylne, 208.

(b) 2 Mylne & Keen, 174.

threw the legal profession into agitation. On the other hand, the late Vice-Chancellor of England considered that the separate estate, if not interfered with previously to marriage or re-marriage, survived, so to speak, into the subsequent or second coverture, as the case might be (a).

As regarded the *restraint on anticipation* (which in Lord Cottenham's view necessarily fell with the *separate use*, to which it was a mere appendage), the Vice-Chancellor of England held that though the *separate use* did revive, the *restraint on anticipation*, when once at an end, could not do so.

It was reserved for the great case of *Tullett v. Armstrong*, in which, in 1838, the whole question was reconsidered and reviewed, first by Lord Langdale, and subsequently by Lord Cottenham, to overrule both Lord Cottenham's views and a series of decisions of the Vice-Chancellor of England.

In *Tullett v. Armstrong* (b), Lord Langdale, upon an elaborate review of the authorities, held that the separate use, and the restraint on anticipation, must, in regard to their operation in the event of a subsequent or second coverture, stand or fall together; and that where either the unmarried woman before marriage, or the widow before a second marriage, omitted to exercise her power of alienation, there either the separate use, or the separate use with its accompanying restraint, would, if apt words were used, revive, so to speak, upon the marriage or second marriage, as the case might be.

(a) See *Davies v. Thornycroft*, 6 Simons, 420.

(b) Reported at the Rolls, 1 Beavan, 1.

Lord Cottenham (a), when the same case came before him on appeal, was clearly of opinion that the separate use and restraint on anticipation must stand or fall together. He seems, however, to have doubted greatly whether any satisfactory principle could be found upon which the preservation of the separate estate, during a subsequent or second coverture, could be supported; but ultimately receding from his former opinion as expressed in *Massey v. Parker*, and founding his decision rather upon its presumable beneficial tendency than upon its logical correctness, he affirmed the judgment of the Master of the Rolls, consoling himself with the reflection that, in the exercise of his judicial power, he was not doing more than his predecessors had done for similar purposes.

This decision may be said to form the last great epoch in the history of the separate use.

2.—I pass to the consideration of the question, By what acts "*inter vivos*" the wife may alien or affect her separate estate?

Here we find a gradual progressive development, which, even at the present day, cannot be said to have reached full growth. The wife's power of alienating her separate estate by any written instrument denoting her intention of so doing, was necessarily always an essential ingredient in the notion of separate property. At a later date, it was held that if a married woman, entitled to a separate estate, professed to bind herself by any written instrument, the execution of which by her would be nugatory unless it operated against her

(a) 4 Mylne & Craig, 377.

separate property, the Court would infer a contract by her to bind her separate estate. Thus a married woman executed a bond, or signed a promissory note. Her execution or signature would be worthless if viewed as evidence of a mere personal engagement; and the courts of equity therefore said, they should be evidence of a contract to bind her separate estate. The leading case upon this point may be said to be *Hulme v. Tenant*, decided by Lord Thurlow (a). There a married woman entitled to rents and profits of real estate for her life for her separate use, joined with her husband in executing a bond; and Lord Thurlow held that her separate estate was made liable by the bond. Lord Eldon frequently expressed his disapprobation of this decision. However, it was followed by Sir Wm. Grant in the cases of *Heatley v. Thomas* (b) and *Bulpin v. Clarke* (c); and the law is now clearly settled, as I before stated it.

But though it must now be held to have been law, as from the time of Lord Thurlow's decision in *Hulme v. Tenant*, that the contract of the married woman, neither referring to her separate estate nor professing to bind it, but purporting merely to bind herself personally, bound her estate and not herself; and although the general reason for so holding was perfectly clear, viz. "*ut res magis valeat*," the precise

(a) 1 Brown's Ch. Ca. 16.

(b) 15 Vesey, 596; a case of a bond given by the wife as surety.

(c) 17 Vesey, 365; a case of a promissory note signed by the wife. And see *McHenry v. Davies*, L. R. 10 Eq. 88, in which case a bill and a cheque were endorsed and drawn respectively by the wife.

mode in which the contract operated remained for a long series of years in doubt.

The views on this subject were mainly two.

The first, and this the wrong one according to the law as now settled (*a*), that the dealings of the married woman were to be viewed as the execution of a power, or at all events as operating by way of disposition; those who maintained this view attempting to assimilate the case to that of a man who, having a power but no estate, professes to convey his estate, and is held to have executed his power.

The second view, and this the correct one, was, that the married woman having contracted to pay generally, and being unable to bind herself personally, should be held to have contracted to pay out of her property.

The two most important cases on this point are *Murray v. Barlee* (*b*), decided by Lord Brougham, and *Owens v. Dickenson* (*c*), decided by Lord Cottenham. Both these learned lords point out very clearly that the bond, promissory note, or other instrument, cannot possibly be treated as an execution of a power, since they neither refer to the power nor to the subject-matter of disposition; and, besides, that if these engagements of married women really operated as appointments under powers, they would, in the event of a married woman entering into many such engage-

(*a*) The doctrine that the dealings are to be viewed as operating by way of disposition has, however, recently received the sanction of Lord Romilly, M.R., see *Shattock v. Shattock*, L. R. 2 Eq. 182, pp. 193, 194.

(*b*) 3 Mylne & Keen, 209.

(*c*) *Craig & Phillips*, 48.

ments successively, be satisfied in order of date, the earlier engagements taking priority over the later : whereas it was and is admitted that in these cases all those claiming under similar engagements rank “*pari passu*.”

The principles upon which the engagements of a married woman, though not referring to her separate estate, are held to bind that estate, may be treated as now clearly settled by the judgments of Lord Brougham and Lord Cottenham, in the cases just mentioned ; and in a very recent decision of Vice-Chancellor Wood (a), that learned judge, adopting the rule as laid down in *Murray v. Barlee*, and *Owens v. Dickenson*, expresses himself thus : “ Wherever a married woman has property settled to her separate use, and she enters into any contract by which it clearly and manifestly appears that she intends to create a debt, as against herself personally if the expression may be used, it will be assumed that she intended that the money should be paid out of the only property by which she could fulfil the engagement (b).”

But though the principles have been thus settled, there remains yet one point uncovered by decision. To what extent, if at all, do the “ general *verbal* engagements ” of a married woman bind her separate estate. The difficulty, if one may say so without presumption,

(a) *Bolden v. Nicolay*, 3 Jurist (N.S.), 884.

(b) See, in accordance with this doctrine *Matthewman's case*, L. R. 3 Eq. 781, where a married woman was held to be a contributor in respect of shares taken by her in a company, and *Picard v. Hine*, L. R. 5 Ch. 274 ; *McHenry v. Davies*, L. R. 10 Eq. 88.

seems to have been somewhat nursed into importance by the over-cautious language of those judges whose decisions furnish us with the soundest principles. Thus Lord Cottenham, in *Owens v. Dickenson*, says (a): “I observe that in *Clinton v. Willes*, 1 Sugd. Pow. 208, *n.*, Sir Thomas Plumer suggested a doubt whether it was necessary that the *feme’s* engagements should be secured by writing: it certainly seems strange that there should be any difference between a contract in writing, when no statute requires it to be in writing, and a verbal promise to pay. It is an artificial distinction not recognised in any other case. *On that point, however, I give no opinion at present.*”

If we were to hazard a conjecture as to the origin of Sir Thomas Plumer’s doubt, it would be this:—he, like Sir J. Leach (b), considered that the dealings of the married woman were all by way of disposition of an equitable interest, and not by way of contract. If so, the engagement ought to be viewed as an assignment of a trust; and then, by the Statute of Frauds (c), would require to be in writing. The moment, however, it was clearly settled that the engagement operated by way of contract and not of disposition, all conceivable ground for distinction between a written and an express verbal agreement was taken away. If a married woman, having a separate estate, says by word of mouth, for a good consideration, “I agree to pay you

(a) Craig & Phillips, p. 55. The reference to Sugden on Powers in the passage quoted is to the 6th edition.

(b) See *Greatley v. Noble*, 3 Maddock, 79; *Stuart v. Kirkwall*, *ib.* 387.

(c) 29 Car. II. cap. 3, s. 9.

“£100 this day fortnight,” her separate estate must, on every principle, be held bound.

There remains, however, one class of cases in which considerable difficulty must often exist upon the question whether the separate estate is bound. I mean those in which there is no distinct engagement by the wife, *written* or *verbal*, to bind herself—where, in fact, the engagement is to be *implied* from her acts. Thus a married woman, having a separate estate, and living apart from her husband, is supplied by tradespeople with necessaries suitable to her condition in life. Is her separate estate bound? In the absence of any course of dealing or conduct to lead to a conclusion, the answer must, I think, depend upon whether the circumstances are such that the married woman was entitled to pledge her husband's credit? Thus, if she were living apart from him, not by her own fault and without any allowance, he would be liable for suitable necessaries, and she ought to be held to have pledged *his* credit, and not her separate estate. If not entitled to pledge her husband's credit, her separate estate ought, I conceive, to be held bound (a).

It is, however, right that you should understand that the whole question of the circumstances under which the verbal engagements of married women will be held to bind their separate estate, must be treated as still requiring to be settled by express decision (b).

(a) See *Wright v. Chard*, 4 Drewry, 684; *Johnson v. Gallagher*, 7 Jurist (N.S.), 274; 3 De Gex, F. & J. 494; *Shattock v. Shattock*, L. R. 2 Eq. 182.

(b) See the elaborate judgment of Vice-Chancellor Kindersley in the case

There is one other mode in which a married woman may dispose of her separate estate, *being in the nature of income*, which demands some brief mention; I mean, by letting her husband receive it. If she do this, it is clear that neither she nor her representatives can claim against him or his representatives *more than one year's arrears*. Whether *any* arrears can be claimed must be considered a doubtful point (a). As respects that particular species of separate estate known as pin-money, the House of Lords, in a celebrated case which has been severely criticised by Lord St. Leonards, I mean *Howard v. Digby* (b), decided that no arrears were recoverable.

3.—We proceed to consider the wife's power of disposing of her separate estate by a testamentary instrument.

So late as Lord Thurlow's time, it appears to have been thought a fair point for contest, whether a married woman could, unless in exercise of a power expressly reserved for that purpose, dispose of her separate estate by a testamentary instrument.

of *Vaughan v. Vanderstegen*, 2 Drewry, 165, and more particularly the observations of the Vice-Chancellor, at page 183; and the cases in the last note.

(a) The state of the authorities is concisely stated in "Lewin on Trusts," 5th ed. p. 550, in the following words:—"Lord Macclesfield, Lord Talbot, Lord Loughborough, Sir William Grant, and Lord Chancellor Brady, held that the wife or her representative could claim nothing. On the other hand, in the judgment of Sir T. Sewell, Lord Camden, Lord King, Lord Hardwicke, Lord Eldon, Sir J. Leach, Sir J. Stuart, Lord St. Leonards, and Smith, M.R., in Ireland, the husband's estate is liable to an account for one year." Mr. Lewin adds, "The better opinion, independently of authority, is thought to be that the wife can recover *nothing* from the husband's estate."

(b) 2 Clark & Finnelly, 634.

But upon principle, the moment the equity courts had determined to treat the married woman as a *feme sole* in respect to property given to her separate use, the right of testamentary alienation followed as of course. One of the earliest cases respecting the testamentary power of married women is that of *Gorges v. Chancie*, which I have previously mentioned (a). It was there held that a *feme covert*, separated from her husband, might dispose by will of the savings of her separate allowance. It is difficult to suppose that in this case any express power was reserved, and, if not, it is conclusive in favour of the general principle. But, however this may be, in *Fettiplace v. Gorges* (b), it was expressly determined by Lord Thurlow that a gift to a married woman for her separate use simply, carried with it as an incident a right of testamentary alienation, and the question has ever since been treated as clearly settled.

It is equally undoubted that this right of testamentary alienation extends to savings of income. The old case in *Tothill* shows this; and, in that of *Gore v. Knight* (c), the case of a power, the principle is thus figuratively expressed: "As she had a power over the principal, she consequently had it over the produce of it, for the sprout is to savour of the root, and to go the same way." In a very late case decided by the Master of the Rolls (d), you will find

(a) p. 214, *supra*. See, too, *Witham v. Waterhouse*, *Tothill*, 91.

(b) 1 Vesey Jun. 46.

(c) Referred to p. 217, *supra*.

(d) *Humpherey v. Richards*, 2 Jur. (N.S.), 432. But savings by the wife out of moneys given to her by the husband for dress, &c., belong to *him*;

the decision in *Gore v. Knight* recognised and commented on.

It is a matter of some difficulty to say how far this testamentary power will be recognised at law in cases where the property is given to the wife for her separate use, without the interposition of any trustee (*a*). I may observe, however, that at the present day the power of pleading equitable defences at law (*b*) may remove some difficulties when the husband sues at law; and that you may take for granted, that should the husband in any case succeed in recovering at law any separate estate, or accumulations of separate estate, he would, so far as they might be well bequeathed by the wife, hold them upon trust for those to whom she bequeathed them.

4.—As to the devolution of the separate estate, where the wife has neither alienated it in her lifetime nor disposed of it by testamentary instrument.

In the consideration of this question, you must of course bear in mind, that in by far the larger number of cases the control of a wife over her own property is

Barrack v. McCulloch, 3 Kay & Johnson, 110. See also *Mews v. Mews*, 15 Beavan, 529; though savings by a wife, living apart from her husband, out of moneys allowed to her for her separate maintenance, would seem to be her separate estate, *Brooke v. Brooke*, 4 Jurist (N.S.), 472; s. c. 25 Beavan, 342.

(*a*) Consult, in reference to this point, the cases of *Messenger v. Clarke*, 5 Exchequer R. 388; *Tugman v. Hopkins*, 4 Manning & Granger, 389; and *Carne v. Brice*, 7 Meeson & Welsby, 183. It would seem that the Master of the Rolls considers the decision in *Messenger v. Clarke* as resting on the inability of the Common Law Courts to recognise this testamentary power; see *Brooke v. Brooke*, 4 Jurist (N.S.), 473.

(*b*) 17 & 18 Vict. cap. 125, s. 83.

preserved by means of a power of appointment by will, with a gift in default of appointment amongst her next of kin excluding her husband. Where this is so, if the wife make no will, still the husband gets nothing, because the parties entitled as in default of appointment take (a).

But the case to which I have now to direct your attention is that of property which is settled, or agreed to be settled, simply *for the separate use* of a married woman, who dies without exercising her privilege of alienation. In this case, upon the death of the married woman the property will devolve in the same manner as it would have done had it never been secured to her separate use. By her death, the coverture determines, the separate use drops off, and the property, regaining its simple original quality, goes to the wife's heir, if it be real estate (b) and to her husband, either in his marital right, or as an administrator, if it be personal estate.

Sir John Leach, I believe, first distinctly decided that this was the true view of the question, in the case of *Proudley v. Fielder* (c). In that case it had been stipulated by marriage articles that certain

(a) But if the wife should die without next of kin, as for instance where she is illegitimate and has no issue, the rights of the husband to her personal estate are unaffected, and will prevail over any claim of the crown; see *Hawkins v. Hawkins*, 7 Simons, 173, the decision in which case is, in principle, the same as that in *Proudley v. Fielder*, mentioned in the body of the text.

(b) Subject, whether the wife's interest be legal or equitable, to the husband's right as tenant by the curtesy; see *Appleton v. Rowley*, L. R. 8 Eq. 139.

(c) 2 Mylne & Keen, 57.

moneys in the funds, the property of the intended wife, should be for her sole and separate use to all intents and purposes, as if she were sole and unmarried. She died intestate, leaving her husband surviving. The next of kin claimed the property against the husband; but Sir John Leach held the latter entitled. His judgment was as follows: "These
" moneys were to be for the sole and separate use
" of Mrs. Leader, as if she were sole and unmarried.
" This expression has no reference to the devolution of
" the property after her death. She is to retain the
" same absolute enjoyment of the moneys, and is to
" have the same power of disposition over them, as
" if she were sole and unmarried; but there is not
" one word here to vest the property after her death
" in her next of kin, or to defeat the right which
" her surviving husband is entitled to acquire as
" administrator."

You observe that Sir John Leach speaks of the husband being entitled as administrator. Whether, in order to clothe his right with a legal title, it is necessary for the husband to take out administration or not, depends merely upon the nature of the property affected by the separate use.

To ascertain what the husband's rights are, assume merely that the separate use, which drops off at the very instant of death, is out of the way. Is the wife, at the moment of death, entitled to chattels personal, passing by manual delivery, such as furniture or cash? Then as the husband might but for the separate use have taken possession of them, so at the very moment of

death he takes them in his marital right simply, and no administration is needed (*a*).

If, on the other hand, the property be of such a nature that the husband, in the absence of any separate use, could only have claimed as administrator, as is the case in respect to the wife's choses in action, such as a sum of money secured to the wife by mortgage executed to her before marriage, then he must equally, after the separate use has dropped off, clothe his title with an administration.

5.—In the observations previously made, no distinction has been taken between personal and real estate ; and if one might, without presumption, hazard a prediction, it would be that ere long separate estate in freeholds of inheritance will be placed on the same footing as that in personal estate (*b*).

It cannot, however, be said that this has yet been distinctly done. The nearest approaches yet made in the direction of assimilation, together with what yet remains to be accomplished, shall be briefly pointed out.

First, the case of *Baggett v. Meux*, decided by L. J. (then V. C.) Knight Bruce, below (*c*), and by Lord Lyndhurst on appeal (*d*), decides that both the *separate use* and the *restraint on anticipation* may be annexed to a gift of real estate in fee to a married woman ; and that a court of equity will give effect both to the separate use and the restraint during the coverture.

(*a*) See *Molony v. Kennedy*, 10 Simons, 254 ; *Bird v. Peagram*, 13 Common Bench R. 639.

(*b*) See new note at p. 240.

(*c*) 1 Collyer, 138.

(*d*) 1 Phillips, 627.

Next, it is clear that where a married woman is entitled to an estate for her own life, in real property, to her separate use, she may contract to sell, or charge, or encumber her whole life estate (*a*). And it may be taken to be settled, that, at least so far as respects her equitable interest, a conveyance by deed acknowledged is not necessary. Where the legal estate in the land is in the wife, upon principle a deed acknowledged would seem requisite to bind the legal estate, though in a case in Ireland (*b*), the Master of the Rolls there appears to have thought even this unnecessary.

Lastly, though upon the principles laid down in *Baggett v. Meux* the wife ought to possess the same power of alienation over real estate held to her separate use simply as over personalty, the question whether she can, as respects freeholds of inheritance settled to her separate use, bind them either by deed not acknowledged or by testamentary instrument, remains yet to be determined.

In the Irish case just before referred to, the Master of the Rolls for Ireland seems to have considered that freehold interests of the wife extending beyond her own life, could be bound only by deed acknowledged. The original doubts upon the subject are due to Lord Hardwicke's views, as expressed in *Churchill v. Dibben* (*c*), and to an anonymous case referred to in *Peacock v. Monk* (*d*); and probably were the result in the first

(*a*) *Stead v. Nelson*, 2 Beavan, 245; and *Wainwright v. Hardisty*, 2 Beavan, 363.

(*b*) *Newcomen v. Hassard*, 4 Irish Ch. Rep. 274.

(*c*) 2 Lord Kenyon's Reports, Part II. p. 84, and 9 Simons, p. 451.

(*d*) 2 Vesey, Sen., 192.

instance of the notion either that the heir was an object of special favour in the eye of the law, or else that, not being a party to the instrument creating the separate use, he could not be bound. As respects the last suggestion, the same principles which bind the husband in the case of personal estate without his consent, ought equally to bind the heir in the case of a real estate (a).

It cannot, however, be denied that these doubts have acquired considerable weight. In the late case of *Harris v. Mott* (b), they were considered by the present Master of the Rolls sufficient to deter him from decreeing a specific performance. In that case real estate had been devised to a married woman, to and for her own sole and separate use and benefit. She and her husband contracted to sell; and before completion she died, having devised to her husband; and the Master of the Rolls thought he could not properly compel the purchaser to take the title in the absence of the heir.

If one were to reason from the past history alone of the separate estate, the ultimate establishment of a power in the married woman to bind *in equity*, either by instrument not acknowledged or by her will, her separate estate in fee simple interests would seem a probable event; and it is to be hoped that the general symmetry of this beneficial creation of equity will not be marred by the anomaly which would be presented by the absence of such a power.

Meanwhile we must wait patiently, until occasion shall arise for solving the doubts which unfortunately

(a) See pp. 219, 220, *supra*. (b) 14 Beavan, 169.

impair, for the present, the completeness of that system, a general outline of which I have this evening endeavoured to present to you (a).

(a) The doubts referred to may be considered as having been finally solved, and the general power of the married woman to bind her separate estate, established by the decision of Lord Westbury, in *Taylor v. Meads*, 5 New Rep. 348 ; 34 Law Journal (N.S.), Chanc. 203. The history of the intermediate decisions and dicta was as follows :—In June, 1861, in the case of *Adams v. Gamble*, 12 Irish Chancery Reports, 102, it was held by Lord Justice Blackburn and Mr. Baron Hughes (Lord Chancellor Maziere Brady dissenting and adhering to his original decision, reported 11 Irish Chancery Reports, 269), that a descendible freehold settled to the separate use of a married woman might be disposed of by her as if she were a *feme sole*. In May, 1863, in the case of *Lechmere v. Brotheridge*, 32 Beavan, 353, the Master of the Rolls, agreeing with the Irish dissentient judge, ruled that the equitable estate in fee simple of a married woman, held for her separate use, can be disposed of only by deed acknowledged. The authorities and dicta will be found elaborately reviewed in the judgments of the Irish Judges and of the Master of the Rolls. In 1864, in the case of *Hoare v. Osborne*, 33 Law Journal (N.S.), Chancery, 586 ; see page 591, Kindersley V.-C. (adhering to his view expressed at 4 Drewry, 38) treated it as clear. that “the fee simple of real estate cannot be settled “to the separate use of a married woman so that by her will she may dispose “of it as if she were a *feme sole*.” On the other hand, about two months later, the Master of the Rolls, in *Taylor v. Meads*, 4 New Rep. 203, intimated that his decision in *Lechmere v. Brotheridge* must be understood as applying only to the power of disposition of the married woman over her fee-simple property by act *inter vivos*; and, it being (according to the views of the Master of the Rolls upon another point) unnecessary so to do, his lordship declined to express any opinion upon the question whether a married woman had or had not, as incident to her separate estate in fee-simple, a general power of testamentary disposition, saying that the point was one of considerable difficulty. On appeal, Lord Westbury differed from the Master of the Rolls upon the point which had rendered unnecessary any decision as to the general power of the married woman, and, in a considered judgment, held that where real estate is vested in trustees upon trust for the separate use of a married woman (without restraint on alienation) she has, as incident to her separate estate, and without any express power being conferred on her, a complete right of alienation, either by instrument, *inter vivos*, not acknowledged under the Fines and Recoveries Act, or by will, and that there is no distinction in this respect between an equitable fee and any other property.

LECTURE VIII.

I APPROACH the subject of "Account, as an instance of the concurrent jurisdiction in equity," with very different feelings from those with which I opened my last lecture; for under the head of Account we find ranged some of the most embarrassing questions in reference to equity jurisdiction—questions, too, which we are obliged to solve as we best may by reference to authoritative decision rather than to principle.

Bear in mind, that I am now considering not *account* generally, but *account* as an instance of *concurrent* jurisdiction. "Account," in some shape, enters more or less largely into almost every head of equity jurisdiction; whether *exclusive* or *concurrent*. Thus, as respects the *exclusive* jurisdiction: in matters of trust, trustees' accounts are taken; in matters of administration, the taking of accounts forms the most important part of the duty of the equity court; and in suits for foreclosure or redemption, accounts of the amount of mortgage debt due, including, when the mortgagee has taken possession, accounts of the rents and profits received by him, are an essential preliminary to the relief ultimately granted. So, in reference to the concurrent jurisdiction, there is hardly any head of equity

in which it may not occasionally be necessary to take accounts.

But my concern this evening is with that portion of the concurrent jurisdiction of the court which rests upon "*account*" simply.

In my brief general review of the "*concurrent jurisdiction*," while mentioning and explaining generally the nature of the various heads of equity falling within that division, I reserved "*account*" for consideration in this lecture. There was more in that reservation than might have been suspected. In postponing "*account*," I postponed that head of equity in which, more than in any other, we seek in vain for a well-defined boundary between the *concurrent* and the *auxiliary* jurisdiction.

Consider generally how the matter stands in reference to definition of jurisdiction under the three great divisions: viz., the *exclusive*, the *concurrent*, and the *auxiliary*. There is ordinarily not much difficulty in determining whether a particular case is one falling within a head of *exclusive* jurisdiction. Trust, mortgage, administration of estates of testators and intestates, are heads of equity whose features are not easily mistaken. So the particular heads of *concurrent* jurisdiction explained in my fifth lecture, viz., Fraud, Accident, Mistake, Partnership, Specific Performance, Dower, and Partition, are definable with tolerable accuracy.

As respects the third division, the *auxiliary*, that, if you recollect, was in my sixth lecture subdivided into two classes, the first that in which the operations of

the court were strictly *ancillary*, such as discovery and perpetuation of testimony; and the second, that in which the court exercised a *controlling* and *superintending* rather than an *ancillary* jurisdiction, as in bills of peace and bills to establish wills.

Now, the jurisdiction of the equity courts in cases of the latter class may, I think, be said to have been defined with sufficient distinctness by the description given of it; and, as respects the former class, where the jurisdiction is merely *ancillary*, no attempt at definition will be requisite. For, if a case be one neither calling for the *auxiliary* jurisdiction of the court in the superintending or controlling sense, nor falling within any head of *exclusive* or *concurrent* jurisdiction, then necessarily the general remedy lies at law only, and the interference of equity can be invoked merely as that of a handmaid.

Summing up, then—

1. We have defined the exclusive jurisdiction.
2. We have defined the concurrent jurisdiction, except *account*.
3. We have defined the latter class of auxiliary jurisdiction, viz., the controlling or superintending; and the former class, viz., the ancillary, if our definition be otherwise completed, needs none.

Consequently, if we can define the limits of the equitable jurisdiction in matters of "*account*," our task will have been substantially completed.

But some of you may ask, Of what *practical* importance is the completion of this task? Assuming the existence of a right to sue at law, what matters it

to the injured party whether he have or not a cumulative remedy in the equity court? My answer is, it matters in two ways—

1. In reference to *discovery*.

2. In so far as the head “account” is concerned, in reference to *the machinery for taking accounts*.

And, first, in reference to *discovery*. Previously to the existence of the powers of discovery recently conferred on the common law tribunals, it was of the utmost importance where an injured party required a discovery from his opponent that he should, if possible, bring his case within some head of equity, so that he might sue in Chancery rather than at law; for, if his remedy were at law only, he was still obliged to appeal to the ancillary jurisdiction of the equity court, and file his bill for discovery; and this, as I pointed out in my sixth lecture, he could do only at his own expense (*a*).

Again, the answer to the bill of discovery was in the common law court viewed strictly and technically as an admission; and, therefore, if the party seeking discovery required to use any portion of his opponent's answer in support of his own case, or in disproof of his opponent's, he was compelled to put the whole in evidence. He was not allowed to use the answer as an admission of any fact, however simple and disconnected from the other statements in it, without making the whole answer evidence. The party answering was thus, so to speak, enabled to give evidence in his own favour.

(*a*) p. 176, *supra*.

In the equity tribunals, on the other hand, in the case of a bill *for relief* as well as discovery, the more rational system prevailed, and still prevails, of allowing the plaintiff to read any selected portions of the answer as admissions, provided only nothing was or is excluded fairly qualifying or bearing upon the particular portions of the answer read (a).

Whether then we consider the terms in reference to costs upon which alone discovery was obtainable in aid of an action or defence at law, or those upon which the discovery itself might be used after it had been obtained, the advantage of a resort to the *concurrent* instead of to the *auxiliary* jurisdiction of the court equally appears; and I may observe that the practice under the new jurisdiction, enabling courts of law to compel discovery, while equalizing in other respects the advantages of suing at law and in equity, still leaves untouched the rule of evidence just commented on. It is, I believe, clear that at law, if you read any part of an opponent's affidavit in answer to interro-

(a) Singularly enough, until the year 1841 the rule in equity, in reference to reading the answer to a cross bill for discovery only, was the same as at law, *i.e.*, the whole must be read if any part was. (See *Lady Ormond v. Hutchinson*, 13 Vesey, 47; and 16 Vesey, 94.) However, by the 42nd Order of the 26th August, 1841 (now Consol. Order xix. rule 6, the bracketed words being added), answers to bills of discovery were put on the same footing in equity as those to bills for relief. The order is in these words:—"Where a defendant in equity files a cross bill for discovery
"only against the plaintiff in equity [or exhibits interrogatories for his
"examination], the answer to such cross bill [or interrogatories] may be
"read and used by the party filing such cross bill [or exhibiting such
"interrogatories] in the same manner and under the same restrictions as
"the answer to a bill praying relief may be read and used."

gatories filed under the new practice, you must read the whole.

But, secondly, I intimated that the definition of the limits of the concurrent equitable jurisdiction in matters of account was of practical importance, in consequence of the difference existing at law and in equity as respects the "*machinery for taking accounts.*" The state of the case on this point is briefly as follows:—

In equity, accounts are taken by the court itself or by its judicial officers. At law, as you will presently learn from the short outline of legal remedies which I am about to attempt, actions involving matters of account commonly result in arbitrations, and the accounts are thus commonly taken by an *arbitrator*; that is to say, a judge selected by the parties litigant, who have at their own expense to provide, so to speak, their judge's salary and a court for him to sit in.

Having thus pointed out the practical importance of defining the true limits of the equity jurisdiction in "*account,*" I propose, as a preliminary to the more immediate task of definition, giving a short outline of the general history of the remedies afforded at law in matters of account.

At common law a writ of "*account*" lay against two classes of persons, viz. :—

1. Against those standing in a situation (not amounting exactly to trusteeship, but) of a *quasi* fiduciary kind recognised by law, as bailiffs, receivers, or guardians in socage.

2. By merchant against merchant.

In this action there were three stages. The first,

that in which it was decided whether the defendant should account or not; and if decided in the affirmative, the judgment was, that the defendant do account, *quod computet*: this stage answered to the original hearing in equity. The second stage at law was the actual taking of the account, which was there done before auditors appointed by the court: this corresponded to the taking of the account in the Masters' Office, or, as under the new equity practice, by the chief clerk. The third stage at law was the judgment for the amount found due, analogous to the order on further directions or further consideration (*a*). But though the analogy between the two procedures was so close, the jurisdiction at law by action of account languished and ultimately fell into desuetude, while that in equity by bill flourished and became firmly rooted.

These very different results may be ascribed to two causes: namely, first, the limited applicability of the action, and its consequent *absorption*, if I may be allowed the expression, into the arbitration system; and secondly, the imperfect powers of compelling discovery possessed by the common law courts.

And first, as respects the limited range of the action of account.

We have already seen that either a *quasi* fiduciary relation between the parties, or that of merchant towards merchant, was necessary to found the action. Flowing from this notion of the necessity of a fiduciary relation, we find that at common law the action lay

(*a*) See p. 96, *supra*.

neither *in favour* of the personal representatives of the person claiming the account, nor *against* the personal representatives of the accounting party. The 13th Edward I., cap. 23, however, remedied the former of these defects, and the 4th Anne, cap. 16, s. 27, the latter: which last enactment also gave an action of account to one joint-tenant or tenant in common against a co-tenant who should receive more than his own share of the rents and profits (a).[†]

But it was then too late to infuse any substantial vigour into the declining action. It had already been supplanted at law by a rival which has since attained vast growth—I mean, “*arbitration*.”

The practice of reference to arbitration appears to have formed part of the common law system from a very early date. If you turn to Rolle’s Abridgement, under the head of “*Arbitrement*,” a very cursory inspection will satisfy you on this point. You will find there and in the Year Books numerous questions discussed in reference to awards during the reigns of the 3rd and 4th Edwards, and of the intermediate Henrys. Some of them exhibit in a somewhat quaint form the workings of an already highly technical system. Thus it was considered that an award, to be good, must possess a certain quality of mutuality, and that the act awarded to be done must appear to be for the satisfaction of one party and in discharge of the other. Hence, in a case of the 9th Edward IV. in the Year Book, Choke J. says by way of illustration, with some apparent want of gallantry: “If a man and a woman

(a) See note a, p. 156, *supra*.

“ submit to arbitration, and the arbitrator do award
 “ that they shall intermarry, this shall be intended to
 “ be no advantage, &c.” But perhaps he had present
 to his mind an imaginary case of an action for breach
 of promise by the lady, in which case his respect for
 the sex would be saved whole.

But, further, and this is more to our immediate purpose, the Year Books disclose symptoms of incipient encroachment on the action of account by arbitration at so early a date as the reign of Henry V. Thus, in *Rolle at Arbitrement R.* we have : “ Un action d’ac-
 “ compt poet estre submit al agard et l’arbitrators
 “ poient faire un agard de ceo, car ceo est uncerten.”(a).

Passing on at a stride some three hundred years, there can be little doubt that one of the most important branches (if not the most important branch) of arbitration business at the early part of the eighteenth century was the adjustment of accounts. This may be collected from the well-known Act of William the Third’s reign, which still forms the foundation of the arbitration system (b).

That Act, after a short preamble pointing out the advantages of references to arbitration by rule of court, continues thus : “ Now for promoting *trade* and ren-
 “ dering the awards of arbitrators the more effectual in
 “ all cases for the final determination of controversies
 “ referred to them by merchants and traders or others,
 “ concerning matters of *account* or trade, or other
 “ matters, &c. ; ” and then the Act proceeds with its enactments, which it is not material for me to notice.

(a) 2 Henry V. 2.

(b) 9 & 10 Will. III. cap. 15.

My concern is with the preamble, the inference from which is, I think, pretty strong, that at the date of the Act *arbitration* had begun to take the place of the action of account; and when we consider that the latter action with its procedure before auditors was limited in its operation, while “arbitration” was available wherever an ordinary action at law lay, it seems to be a natural result that the procedure of larger application should gradually become more and more understood, and should supersede that of more limited use. In fact, the question being, Should an ordinary action at law be brought with a view to proceeding by arbitration, or should an action of account be brought which would be prosecuted before auditors? the answer was in favour of the course calculated to result in the better understood of the two procedures. Finally, the procedure before the auditors was subject to the special disadvantage that a vast number of separate issues respecting the payment or receipt of any particular “items” of account might be raised by either party, who might claim as of right to have them determined by a jury; a course which, when pursued, must necessarily have led to great expense and delay; and this circumstance would naturally cause a preference to be given to arbitration (*a*).

But, secondly, we may regard as one of the causes of the decline of the action of account the imperfect powers of compelling discovery possessed by a court of law as contrasted with a court of equity. This

(*a*) Lord Hardwicke, indeed, attributed to this cause the decline of the action of account; see *Ex parte Bax*, 2 Vesey, Sen. 388.

indeed appears to have been considered by Mr. Justice Blackstone to have been the sole cause of the decline. He says :—" But, however, it is found by experience " that the most ready and effectual way to settle these " matters of account is by bill in a court of equity, " where a discovery may be had on the defendant's " oath, without relying merely on the evidence which " the plaintiff may be able to produce " (a). This statement might be accepted as correct if we were able to show you, as we proceed further in our lecture, a perfect jurisdiction in equity in all matters falling within the scope of the old action of account. But the truer view is, I think, that arbitration and equity divided between them the old common law jurisdiction in " account ; " and in reference to the imperfect powers of discovery alluded to by Mr. Justice Blackstone, it must be borne in mind that the imperfection was partially (b) remedied by the section of the 4th Anne, cap. 16, before referred to, which, in its efforts to revive the drooping jurisdiction, conferred on the " auditors " in the action of account power to administer an oath and examine the parties touching the matters in question.

In connexion with this question of the imperfect powers of the common law courts to compel discovery, let me recommend you to look at one of the ordinary

(a) Bl. Com. vol. iii. p. 164.

(b) See *Wheeler v. Horne*, Willes, 208, in which case an opinion is distinctly expressed that these powers of the auditors exist only when the action is brought under the Act. The results would be singularly anomalous. The auditors would have power to examine the executors of a bailiff, but not the bailiff himself.

forms of reference to arbitration appended to *Russell on Arbitrations*, or *Watson on Awards*. There you find the arbitrators invested with authority to examine the parties, to call forth the production of papers; in fact, to exercise those powers which give to the jurisdiction in equity its peculiar value. The common law arbitration system is, indeed, a happy instance of engrafting a scion of equity practice on the stock of common law jurisdiction; and much has been done by the Legislature in aid of the efforts of those engaged in the practical working of the law (*a*). The infirmity of the arbitration system lies in the circumstance already adverted to—that the fees to the arbitrator, and frequently the expense of the place in which his sittings are held, fall upon the litigant parties. They pay, as I said, for their own judge, and provide their own court.

And now I reach, at last, the particular object of my lecture, viz., the equity jurisdiction in account. To allot nearly one-half of a lecture to mere introduction seems out of due proportion; but my task is to convey accurate elementary knowledge, and this cannot possibly be done without exhibiting side by side the workings of those two great systems, *law* and *equity*, which together constitute our jurisprudence.

Well, then, what jurisdiction has equity in matters of “account?” that is to say, neglecting all those heads of exclusive or concurrent jurisdiction where account is an adjunct more or less frequent, in what

(*a*) See 3 & 4 Will. IV. cap. 42, ss. 39, 40, & 41; 17 & 18 Vict. cap. 125, ss. 3 to 17.

cases may a bill in equity be filed merely to obtain an account (a) ?

This brings me at once to the consideration of a ground or supposed ground of equity jurisdiction frequently referred to both in the Reports and by the text writers. The most concise statement of the principle is that of Lord Nottingham in the case of *Parker v. Dee* (b), frequently referred to, and adopted verbatim by Mr. Ballow in the treatise on equity commonly quoted as "*Fonblanque on Equity*." In that case, the defendant's counsel urging that the suit in equity ought to be dismissed, because the plaintiff had obtained a discovery and might go on at law, his lordship said:—"As for dismission to law because the plaintiff hath discovery here, when this court can determine the matter, *that* shall not be a handmaid to other courts, nor beget a suit to be ended elsewhere."

It is obvious that if the principle here laid down had been carried out to the full, the ancillary jurisdiction of the court could never have existed. Every plaintiff requiring discovery would have said, "I am obliged to come for discovery; give me relief also;" and the court must have answered, "We will do so." The equity jurisdiction would then practically have

(a) There is a remarkable order of Lord Ellesmere, 11th October, 1614, which shows that at that date the Chancery jurisdiction in "*account*" was discountenanced upon the very ground to which Sir William Blackstone attributes the growth of the jurisdiction, viz., the power of discovery upon oath. It is as follows:—"Marchants' accompts and such like are not to be examined in the Chancery, for none is to accompt upon oath but to the king onely. Yet frawd and covyn is to be examined and punished."—Sanders' Orders in Chancery, vol. i. p. 86.

(b) 2 Chancery Cases, 201.

been unbounded, for it is hard to suppose a case in which some facts requiring proof by the plaintiff in equity would not be within the knowledge of the defendant, and the extent to which discovery was actually needed by the plaintiff could hardly have been brought to any accurate test. The principle thus largely stated would have applied equally to an action of assumpsit for not accepting goods, as to a case of intricate and complicated accounts.

It may seem needless to say that no principle capable of such general application exists ; yet even so recently as the time of Sir Thomas Plumer we find that learned judge adverting to the supposed principle in language almost as general as that of Lord Nottingham. Thus, in the case of *Ryle v. Haggie* (a) his Honour says :
“ When it is admitted that a party comes here properly for the discovery, the court is never disposed to occasion a multiplicity of suits by making him go to a court of law for the relief.”

The rational course, if I might without presumption express an opinion, would, as it seems to me, have been for the equity court to have assumed concurrent jurisdiction in all those cases where a plaintiff came alleging his need of discovery, and where, having regard to the *nature of the case*, trial by an equity judge afforded a convenient mode of determination ; and to have limited itself to the office of handmaid whenever trial by jury and *vis à voce* examination in open court seemed desirable.

No such general intelligible rule of jurisdiction can,

(a) 1 Jacob & Walker, 234, see 237.

however, be traced. The nearest approach ever made to any general statement has been, that “in most cases of fraud, accident, mistake, and account, where discovery was needed, the court would not turn the plaintiff in equity back to law, but would give relief as well as discovery;” and as Mr. Fonblanque, in one of his notes (a) to the “Treatise on Equity,” has stated his inability to strike out the distinguishing principle upon which courts of equity have proceeded in assuming or declining entire jurisdiction in cases where discovery was needed, I may well be excused the attempt.

Relinquishing, then, all endeavour to define by means of general principle the cases in which equity assumes jurisdiction in matters of account, I will attempt to classify the results of the actual decisions on this head. They appear to be as follows :—

1.—Equity will assume jurisdiction in favour of a principal against his agent, though not in favour of the agent against the principal.

2.—Equity will assume jurisdiction where there are mutual accounts between the plaintiff and defendant.

3.—It will do so where there are circumstances of special complication.

First then—A bill for an account will lie in equity by a principal against his agent. This proposition was first distinctly laid down by Sir John Leach, to whose short, terse judgements we owe many bold enunciations of principle, of which not a few have

(a) Book VI. ch. iii. s. 6, note 1.

held their ground. I refer now to the case of *Mackenzie v. Johnston* (a). In that case the plaintiff had agreed with Johnston and Meaburn, owners of a vessel, to ship earthenware to Bombay, to be sold there on their account, and the shipment had been made. The bill was against Johnston and Meaburn for an account: they demurred. The Vice-Chancellor's judgement is as follows:—"The defendants here were agents for
 " the sale of the property of the plaintiff, *and wherever*
 " *such a relation exists a bill will lie for an account;*
 " the plaintiff can only learn from the discovery of the
 " defendants how they have acted in the execution of
 " their agency, and it would be most unreasonable
 " that he should pay them for that discovery if it
 " turned out they had abused his confidence; yet
 " such must be the case, if a bill for relief will not
 " lie.

In this pithy judgement we find, you will observe, not merely the broad enunciation of the rule, but also distinct indications of the grounds on which it stands. The facts are, in general, exclusively within the knowledge of the agent; the principal therefore usually requires discovery, and if a bill for relief did not lie, he could obtain discovery only at his own expense. You should note further the single word "confidence," referring to the fiduciary relation between the parties, which forms a distinct ground for supporting the jurisdiction in equity (b). Sir John Leach's proposition

(a) 4 Maddock, 373.

(b) Lord Justice Turner would seem, indeed, to consider this the *principal* ground. See the extract from his judgement in *Padwick v. Stanley*,

must, I consider, be viewed as 'sound law in all its breadth.

Some difficulty, no doubt, occurs occasionally in determining whether the particular relation of principal and agent does exist between two parties. One of the best illustrations of this will be found in the conflicting opinions which long obscured the relation between banker and customer, and in the litigation which resulted in the final settlement of the law on that point; and, as the general importance of the question makes it doubly interesting, I will briefly review its history.

There can be little doubt that the popular notion for a long time was, perhaps still is, that the banker stood towards his customer in the position of a kind of trustee or agent. People talk indeed even now of having so much money in Coutts's or at Hoare's, with a kind of belief that the banking firm holds the money as a depositary only. But, further, the true view on this point has only been settled amongst lawyers within the last twelve years. Thus, in the case of *Bowles v. Orr (a)*, Lord Abinger, C.B., in 1835, thus expresses himself: "It appears to me that a customer
" who trusts his banker with a fund, is justly entitled
" to call on his banker for an account of it, and that

given at p. 259, *infra*. And see, also, *Barry v. Stevens*, 31 Beavan, 258, and the judgement of Lord Hatherley in *Moxon v. Bright*, L. R. 4 Ch. App. 292, where his lordship ruled that the mere existence of the relation of principal and agent was not sufficient to sustain a bill by the former for an account unless the agent held a fiduciary position.

(a) 1 Younge & Collyer's Exchequer R. 474.

“ the banker by receiving it becomes his agent, and
“ accountable to him for it.”

You find in these words both the expression of the popular view that the banker was an *agent*, and also a reference to the consequence which would have followed had that view been correct, viz., that a bill for an account would have lain in equity ; however, in the case of *Foley v. Hill*, which cause came first before the late Vice-Chancellor of England, then before Lord Lyndhurst on appeal, and ultimately before the House of Lords, the relation between banker and customer was decided to be that of debtor and creditor merely, and a bill for an account by the latter against the former was dismissed.

In the first instance the Vice-Chancellor of England, when the case came before him, decreed an account. Lord Lyndhurst, on appeal (*a*), dismissed the bill, using in the course of his judgment the following words : “ It is quite clear that a banker is not to be
“ considered a trustee for his customer in the legal
“ sense of the term. Money advanced by a customer
“ to a banker is a loan, and constitutes a debt.” Upon appeal to the House of Lords (*b*), Lord Lyndhurst’s views were affirmed by Lord Cottenham, Chancellor, Lord Brougham, and Lord Campbell ; and, the fiduciary relation failing, the bill for an account, notwithstanding an attempt to sustain it on the distinct

(*a*) See 1 Phillips, 399.

(*b*) See 2 House of Lords Cases, 28, also *Pott v. Clegg*, 16 Meeson & Welsby, 321 ; *Jackson v. Ogg, Johnson*, 397.

ground of complication, apart from the fiduciary relation, failed also.

Next, although a principal may file a bill against his agent, it is clear that an agent cannot do so against his principal. The decisions are distinct on this point (*a*), and the absence of reciprocity in this respect is, having regard to the grounds for the jurisdiction in favour of the principal against the agent, as indicated by Sir John Leach, consistent with sound principle. For, first, the agent has commonly all the knowledge requisite to support his rights, and requires no discovery; and, secondly, the agent reposes no special confidence in the principal.

The present Lord Justice Turner, in a case which came before him when Vice-Chancellor (*b*), expressed himself on the question of reciprocity as follows: "It was then said that this was a case of principal and agent; and that if the principal may file a bill against his agent, the agent may file a bill against his principal; but I cannot admit that the rights of principal and agent are correlative. The right of the principal rests upon the trust and confidence reposed in the agent; but the agent reposes no such confidence in the principal."

(*a*) *Allison v. Herring*, 9 Simons, 583; *Padwick v. Stanley*, 9 Hare, 627.—See, also, *Smith v. Leveaux*, 1 Hemming & Miller, 123; s. c. on appeal, 33 Law Journal (N.S.) Chanc. 167, 2 De Gex, Jo. & Sm. 1, in which the general rule was treated as settled, Lord Hatherley, then V.-C. Wood, holding, however (though his decision in this respect was reversed by the Lords Justices on appeal), that an exception ought to be made in a case where there had been receipts by the principal, of the particulars whereof the agent was ignorant, and on which a commission was payable to the latter.

(*b*) *Padwick v. Stanley*, 9 Hare, 627.

But whatever the grounds, the result is certain. A bill does lie by principal against agent, but not by agent against principal, for an account.

Secondly—Equity will assume jurisdiction where there are *mutual accounts* between the plaintiff and defendant. Perhaps I ought to have said that the *better opinion seems to be to this effect*; for in reference to this, as indeed in reference to other questions arising upon the equity jurisdiction in matters of account, the authorities are mainly agreed on one point only, viz., the extreme difficulty of defining the jurisdiction.

The nearest approach to a systematic definition of the equity jurisdiction in cases of mutual account is that contained in the judgement of Lord Justice (then Vice-Chancellor) Turner, in the case of *Phillips v. Phillips (a)*. His lordship in that case, in allowing a demurrer to a bill for an account, expressed himself as follows: “I have no doubt that this bill cannot be maintained. I take the rule to be, that a bill of this nature will only lie where it relates to that which is the subject of a mutual account; and I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other’s account. I take the reason of that distinction to be, that, in the case of proceedings at law, where each of two parties has received and paid on account of the other, what would be to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely

(a) 9 Hare, 471.

“that the other party had received money on his
“account, but also to enter into evidence of his own
“receipts and payments—a position of the case
“which, to say the least, would be difficult to be
“dealt with at law. Where one party has merely
“received and paid moneys on account of the other,
“it becomes a simple case. The party plaintiff has
“to prove that the moneys have been received, and
“the other party has to prove his payments. The
“question is only as to the receipts on one side and
“the payments on the other, and it is a mere question
“of set-off; but it is otherwise where each party has
“received and paid.”

The rule here laid down is, I should have considered, reasonably clear and free from objection; but his Honour Vice-Chancellor Kindersley seems on a recent occasion to have placed a different construction upon the judgement of Lord Justice Turner from that which appears to me the obvious one, and indeed to have denied altogether the efficacy of mutuality of accounts as a ground for equity interposition. I allude to the case of *Fluker v. Taylor*. In his judgement in that case, the Vice-Chancellor, though not expressly mentioning *Phillips v. Phillips*, evidently refers to it in the following observations (a): “It is difficult to lay down
“any fixed rule which goes to mark out the line
“between those cases where an account must be taken
“in equity and where it need not. An attempt has
“been made to lay down such a rule by saying the

(a) See 3 Drewry, 191.

“accounts must be mutual, that there must be receipts
“and payments on both sides.

* * * * *

“But it really appears to me that it would be dangerous
“to lay down the rule in any such terms. For, take
“the common case of any gentleman of fortune keeping
“a mere money account, not a business account, with
“his banker: he pays money to the banker and the
“banker pays his cheques; that is mutual receipt and
“payment; the banker receives money from the cus-
“tomer and pays cheques to the customer; and the
“customer pays money into the banker’s and draws
“money out. If the rule were as stated, such a case
“would fall within it, while it is clear in such a case no
“bill would lie (a). It is therefore dangerous to say the
“equity depends on mutual receipts and payments;
“the equity must depend in each case on the nature
“of the account; it depends on this, whether the
“account is in its own nature, not merely from the
“number of items but from its own nature, so compli-
“cated that this court will say such an account cannot
“be taken in a court of law.”

Notwithstanding the great weight due to any obser-
vation falling from so careful a judge, it is difficult not
to feel that the doubts here expressed by him are out-
weighed by the judgement of Lord Justice Turner, and
by the distinct expression of opinion on the part of Lord
Eldon in the leading case of *Dinwiddie v. Bailey* (b),
who says, in speaking of the equity jurisdiction in

(a) See p. 258, *supra*.

(b) 6 Vesey, 141.

account, "there must be mutual demands forming "the ground;" and it may, I think, be safely laid down that whether Lord Justice Turner's definition of "mutual accounts" ultimately prevail or not, "*mutual accounts*" will remain firmly fixed as a ground of equity jurisdiction in *account (a)*.

Thirdly—Equity will assume jurisdiction *where there are circumstances of special complication*.

Here, again, both the decisions and dicta create a distressing uncertainty as to the nature and extent of complication requisite to found the equity jurisdiction. In the leading case of *O'Connor v. Spaight (b)*, Lord Redesdale, in a passage of his judgement which is frequently quoted on this point, uses the following language: "The ground on which I think that this is a "proper case for equity is, that the account has become "so complicated that a court of law would be incompetent to examine it upon a trial at *Nisi Prius* with "all necessary accuracy, and it could appear only from "the result of the account that the rent was not due (c). "This is a principle on which courts of equity constantly "act by taking cognisance of matters which, though "cognisable at law, are yet so involved with a complex "account that it cannot properly be taken at law; and "until the result of the account, the justice of the case "cannot appear."

(a) See the observations of Lord Chelmsford in *Scott v. Corporation of Liverpool*, 3 De Gex & Jones, 359.

(b) 1 Schoales & Lefroy, 305.

(c) The question upon which the fate of the litigation between the plaintiff and defendant hinged was, whether any rent was in fact due.

Lord Redesdale's observations, if they could with safety be accepted as a correct representation of the doctrine of the court as to complication, would furnish a broad intelligible rule. In every case the question would simply be, Could the accounts be taken at *Nisi Prius*, or would the common law judge, either before trial under the special power conferred by the Procedure Act of 1854 (a), or by moral coercion upon the cause coming on at *Nisi Prius*, compel a reference to arbitration?

Nor are Lord Redesdale's views unsupported by other dicta. In the case of the *Taff Vale Railway Company v. Nixon* (b)—in which, as I shall presently endeavour to show, the special facts were such as clearly to make the case a fitter one for equity than law—you will find, first, *Lord Cottenham* referring with approbation to the rule as laid down by Lord Redesdale, and then *Lord Campbell* expressing himself as follows:—

“ I do not proceed merely upon the ground which is
 “ stated in the case as having been taken by his
 “ Honour the Vice-Chancellor; I proceed upon this
 “ ground, that here is a complicated account that

(a) 17 & 18 Vict. cap. 125, s. 3—See *Croskey v. European, &c., Shipping Company*, 1 Johnson & Hemming, 108, in which (while holding, in accordance with the well-established doctrines of the Court, that the new Common Law jurisdiction had not impaired the jurisdiction of the Court of Chancery) Lord Hatherley, then V.-C. Wood, intimated that the mere circumstances of a plaintiff at law giving notice of his intention to move for a reference to arbitration amounted to an admission that the Court of Equity was the proper jurisdiction.

(b) 1 House of Lords Cases, 111.

“ could not by possibility be taken by a jury. The
“ facts of the case, as stated by my noble and learned
“ friend on the woolsack, very clearly show that it
“ would be a mere mockery to bring such an action
“ before a jury. What would be done if such an action
“ were brought at *Nisi Prius*? I know that within
“ five minutes from the opening of the case by the
“ leading counsel for the plaintiffs, the judge would
“ say, ‘ If we sit here for a fortnight we cannot try
“ this sort of case ; and, therefore, it is indispensably
“ necessary for the sake of justice—not to save us from
“ the trouble of trying the case, which we are perfectly
“ willing to take—but for the sake of justice, that
“ there should be a reference to an arbitrator who will
“ take accounts between the parties.’ ”

Lord Brougham again, following Lord Campbell, spoke thus :—“ My Lords, I rise only to mention a
“ circumstance which my noble and learned friend
“ reminds me of, that it was formerly so much a
“ matter of course, when cases of this sort came
“ before us at *Nisi Prius* upon the northern circuit,
“ to refer them to arbitration, that we invented a
“ phrase for it at consultation, the meaning of which
“ was, that it could not be tried, and that the leading
“ counsel for the plaintiff would what is commonly
“ called ‘ open a reference.’ Now, the *course ought*
“ *to be a bill in equity* ; that is clearly the best
“ remedy.”

But notwithstanding these strong observations, it would be dangerous to lay down that the mere circumstance that the case is clearly one for an arbitra-

tion would be sufficient to found the jurisdiction in equity. It is easy to conceive a case in which, owing not to any special complication, but merely to the large amount claimed and the great number of items—Lord Campbell's observations point to a case of this sort—a reference to arbitration would be a matter of course; not in consequence of the inability of a jury to take the account, but because of the waste of time on the part of judge, counsel, and witnesses, wholly disproportioned to any resulting advantage. Now it certainly cannot be said that the jurisdiction of the Equity Court to entertain an account in cases of this sort, is established. On the contrary, in the case of the *South-Eastern Railway Company v. Martin* (a), in which an action had been brought by surveyors and engineers against a railway company to recover the balance of an account containing some four hundred items of charge and discharge, Lord Cottenham himself, while refusing to stay the action by injunction, made the following remarks upon the *Taff Vale Railway Case*. He said: "The observations of two noble Lords in the House of Lords, in the case of the *Taff Vale Railway Company v. Nixon*" (his Lordship here evidently refers to Lord Campbell and Lord Brougham, forgetting, apparently, his own general approval of Lord Redesdale's views), "have been referred to as expressing opinions, that accounts ought to be decreed in all cases in which references would be pressed at *Nisi Prius*; I apprehend that

(a) 2 Phillips, 758 (where the plaintiffs are incorrectly called the *North-Eastern Railway Company*), and 1 Hall & Twells, 69.

“ those observations were not intended to intimate any
“ such rule or opinion, but were intended only to
“ exemplify the great difficulty in dealing with such
“ cases at law.”

Further, in the case of *Phillips v. Phillips*, already referred to, Lord Justice (then Vice-Chancellor) Turner expresses himself thus (a): “ It is true that a case
“ of mere receipts and payments may become so com-
“ plicated, as Lord Cottenham said in the case of the
“ *Taff Vale Railway Company*, that the account cannot
“ be taken at law, and may properly become the sub-
“ ject of the jurisdiction of a court of equity. But
“ when the account is on one side only, I think a
“ strong case must be shown before this court will
“ exercise its jurisdiction. If the door of this court
“ be opened to every case in which accounts would
“ not be taken in an action at law, but a court of law
“ would send them to a reference, I do not know
“ where there would remain any protection against
“ suits in equity to parties between whom any account
“ existed.”

On the whole, while regretting that the broad intelligible rule laid down by Lord Redesdale should not be clearly established, it is impossible to treat it as having attained the force of law.

What, then, to recur to our original proposition, is the nature and extent of *complication* requisite to found the equity jurisdiction? The question can only be answered vaguely and imperfectly by instances. There can, I consider, be no doubt that where there

are complicated questions of account between A, B, and C, three parties having distinct interests—where, in fact, the case approaches what might be called, in the language of a late nautical novelist, a triangular duel—a court of equity will interfere. The *Taff Vale Railway Case*, before alluded to as having elicited from Lord Cottenham, Lord Campbell, and Lord Brougham a general approbation of Lord Redesdale's views, was one of this class, and needed no such broad general principle as that of Lord Redesdale to warrant the decision of the House. There Nixon, a railway contractor, contracted with the *Taff Vale Railway Company* to execute certain works. Subsequently he entered into an agreement with Storm, another contractor, to supply him with funds to enable him to fulfil his contract. Later still, Nixon and Storm jointly entered into a new contract with the Company, and then Storm became bankrupt. Various complications arose in reference to the respective rights of Nixon and of Storm's assignees; and it was held that under these circumstances a bill would lie by Nixon against the Railway Company.

The case of the *South-Eastern Railway Company v. Brogden* (a), the facts of which are too complicated to admit of my now laying them before you, will show you what particular circumstances were, and what were not, considered by *Lord Truro* sufficient to warrant the interposition of equity in matters of account; and his lordship's judgement in that case is particularly valu-

(a) 3 Macn. & Gor. 8—and see *Southampton Dock Co. v. Southampton Harbour & Pier Board*; L. R. 11 Eq. 254.

able, as pointing out and dwelling upon the importance of the distinction between a court of equity assuming a jurisdiction in matters of account, and its interfering by injunction to withdraw a matter in which an action has been commenced from the legal jurisdiction. You will do well to classify carefully, with reference to this distinction, the authorities which I have this evening mentioned. Thus, in *Mackenzie v. Johnston*, *Foley v. Hill*, *Allison v. Herring*, and *Padwick v. Stanley*, all referred to under the first ground of jurisdiction (a), the question simply was, Should equity give an account? So as respects *Phillips v. Phillips* (b), under the second head. In *Fluker v. Taylor*, referred to under the second head (c), and in all the cases which I mentioned under the third head, except that of the *Taff Vale Railway*, the assistance of the court was invoked to stay proceedings at law.

There can, I think, be little doubt but that the distinction pointed out by *Lord Truro* will, in the course of the further development of our equity system, become a marked feature in that portion of it which relates to "account." The difference between affording to a suitor, who prefers coming into equity, the beneficial aid of the court, and interfering to withdraw a matter from law merely because the litigation there will probably result in a reference to arbitration, is immense. Nor should it be forgotten that since Lord Redesdale's observations in *O'Connor v. Spaight* were uttered, the powers and facilities of dealing with ac-

(a) See pp. 256, 258, 259, *supra*.

(b) p. 260, *supra*.

(c) pp. 261-2, *supra*.

counts at common law, by way of arbitration, have greatly increased (a); and though, according to the well-known rule (b), this circumstance cannot be viewed as having in the slightest degree diminished or affected the equity jurisdiction, it may well influence the judge where the question is not as to exercising jurisdiction in equity, but as to staying proceedings at law.

Finally, except as regards my first head of equity jurisdiction in account, that, namely, which is grounded on the relation of principal and agent, I find myself reluctantly compelled to say, in conclusion, that my observations of this evening must be viewed as beacons pointing out shoals and quicksands rather than as landmarks guiding you to safe havens.

It is now not quite ten years since (c), that Lord Cottenham, in the case of the *South-Eastern Railway Company v. Martin* (d), used the following words:—

“ The jurisdiction in matters of account is not exercised, as it is in many other cases, to prevent injustice which would arise from the exercise of a purely legal right, or to enforce justice in cases in which courts of law cannot afford it; but the jurisdiction is concurrent with that of the courts of law, and is adopted because, in certain cases, it has better means of ascertaining the rights of parties. It is therefore impossible with precision to lay down rules, or establish definitions, as to the cases in which it may

(a) See p. 252, note (a), *supra*.

(b) See p. 182, *supra*.

(c) *i.e.* from 1858.

(d) 2 Phillips, 758; see p. 762. The report at 1 Hall v. Twells, p. 73, varies slightly.

“ be proper for this court to exercise this jurisdiction.
“ The infinitely varied transactions of mankind would
“ be found continually to baffle such rules, and to
“ escape from such definitions. It is therefore neces-
“ sary for this court to reserve to itself a large discre-
“ tion, in the exercise of which due regard must be
“ had, not only to the nature of the case, but to the
“ conduct of the parties.”

I must confess, gentlemen, that I am unable to take so favourable a view as Lord Cottenham did of the uncertainty which exists respecting the equitable jurisdiction in *account*; an uncertainty which, to the best of my judgment, is both unnecessary and distressing. However, of one thing there is no doubt—the decisions of the last ten years have added little certainty to the doctrines of the court. Our views still remain just as obscure; and in this obscurity—though cheered somewhat, I may perhaps venture to hope, by the faint glimmer of this evening’s lecture—I am compelled perforce to leave you.

LECTURE IX.



THE subject of this evening's lecture is "Injunction "in cases where the Court exercises an *auxiliary* jurisdiction." This title, and the circumstance that this will be my last opportunity of addressing you on the subject of equity, alike suggest to me the propriety of a few words of explanation upon a point which might otherwise cause embarrassment to some of you,—I mean the want of *homogeneity*, if I may be allowed the phrase, in the terms used to denote the different heads of equity ranged under the three principal divisions of *exclusive*, *concurrent*, and *auxiliary*.

Most of you have probably heard of what in logic is called cross-division. We may take any number of individual persons or things—let us assume the whole of mankind—and classify them, either *physiologically* into the Caucasian, Negro, Mongol, and other races; or *theologically*, into Christians, Mahommedans, Buddhists, and other religionists; or *politically*, into British, French, Prussians, &c. (a). So, as respects *equity*, we may take the whole subject and divide it, either, as Mr. Smith does in his Manual of Equity, according to the nature of the relief afforded or of the function

(a) See Whately's Logic.

performed by the Court, into *Remedial Equity*, *Executive Equity*, *Adjustive Equity*, *Protective Equity*, and *Auxiliary Equity*, or according to the plan which we have ourselves followed.

But whether we follow Mr. Smith's classification or our own, we find ourselves considerably embarrassed, as we proceed to the task of subdivision, by the circumstance that the terms which we are obliged to use to denote our different heads of subdivision bear no relation to our general plan of classification. Thus, *trust* and *mortgage* are words referring to the nature of the contract between the parties litigant; *fraud* refers to a course of conduct imputed by one party to the other; *partition* and *specific performance* to the remedy afforded by the Court; *discovery* to certain rules of equity pleading and practice adopted for eliciting truth: and thus the very terms used in describing the heads of equity into which our main divisions have been subdivided, naturally suggest a different classification from that which we are pursuing; in fact, a kind of cross-subdivision. Occasionally too it becomes necessary to use in a limited sense the term which has been selected to denote some particular head of equity; as we have done in the case of "account" falling under the *concurrent*, and "discovery" falling under the *auxiliary* jurisdiction.

Well, gentlemen, these very embarrassments and difficulties exist in regard to the use of the word "*injunction*" as denoting a head of equity. At first it might seem impossible to use the word for that purpose. For what is injunction? Merely that process of the

Court of Chancery by which, where its aid is invoked, it prohibits the doing of some act which is either unlawful or in the eye of the Court inequitable. It is a powerful engine of the Court, by which, in a large number of cases, it gives effect to the maxim before alluded to: "Equity acts *in personam*"—an engine equally available in the administration of every portion of its jurisprudence. Thus, in a case within the *exclusive* jurisdiction, say of trust, the Court will restrain the trustee by injunction from dealing improperly with the trust fund; and in a case within the *concurrent* jurisdiction, such as that of account in *O'Connor v. Spaight*, mentioned in my last lecture (a), the Court will occasionally enjoin proceedings at law. But just as in my general review of the auxiliary jurisdiction I took "discovery," which in its general acceptation includes all discovery, however obtainable, and treated of that particular kind of discovery only which concerned the division of jurisdiction then under consideration; so this evening I shall attempt to group together certain instances of the exercise of the process of injunction which appear to me to fall rather within the domain of the auxiliary jurisdiction of the Court than any other.

Now, in considering the subject of "*injunction*" generally, the cases in which the courts of equity interfere may be conveniently arranged into two classes, viz. :—

First, the cases in which equity interferes to restrain

(a) See p. 263, *supra*.

a person from instituting or continuing judicial proceedings in some other court; and,

Secondly, cases in which equity interferes to restrain the commission of acts either unlawful or wrongful in the eye of a court of equity (*a*).

With the first class of cases we have no immediate concern this evening. In one particular instance only are injunctions of that class connected with the *auxiliary* jurisdiction of the court, namely, where a defendant at law files a bill of discovery in equity in aid of his defence, and obtains an injunction to restrain the proceedings at law until his bill is answered. Having regard, however, to the importance of this class of injunctions, both historically and as illustrating the principles of action of the court, some brief notice seems desirable.

In cases of this class, whenever a person by fraud, accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction which in the eye of a court of equity must necessarily make the ordinary court an instrument of injustice, and it is therefore against conscience that he should use the advantage, the equity court, to prevent manifest wrong, will interpose by restraining the party whose conscience is thus bound from using the advantage he has improperly gained (*b*). Equity, in fact, says to the person who is proceeding contrary to equity: "Desist from your pro-

(*a*) This is, in substance, the arrangement adopted by *Mr. Drewry*, in his work on Injunctions.

(*b*) See Mitford's Pleading, p. 127, whence this statement is taken almost verbatim.

ceedings in the other court, or we will put you in prison" (a).

The jurisdiction of the court in decreeing injunctions to stay proceedings in other courts, may be traced back to a very early date. Thus, turning to our *repertorium* of antiquarian knowledge, the *Calendars of Proceedings in Chancery*, we find various instances of the exercise of this jurisdiction. In the reign of Edward IV. there is a case of *Astel v. Causton*, seeking to restrain an action in the Common Pleas upon certain bonds (b). In the reign of Richard III. there is a curious instance of a bill filed to restrain an action brought by a person whom the plaintiffs in equity allege to have been a *villein regardant* to the Manor of St. Giles Tydde, belonging to the Bishopric of Ely, and seeking an injunction, until certain evidences, which had been mislaid by reason of the flight of Morton Bishop of Ely beyond the realm, should be recovered (c).

It could hardly be expected that the assumption by the Court of Chancery of so large a jurisdiction, would be readily acquiesced in by other courts; and the Year-Books of the time of Edward IV. afford abundant evidence of the struggle then going on between the common law judges and the Chancellor (d).

(a) See an early case referred to at p. 72, note (a), *supra*, in which the injunction assumed the form of the old *subpœna*, except only that a penalty of 1000*l.* instead of 100*l.* was named.

(b) *Calendars of Proceedings in Chancery*, vol. i. p. cviii.

(c) *Edyall v. Hunston*, *ib.* p. cxiii.

(d) See the cases mentioned in *Spence's Equitable Jurisdiction*, vol. i. p. 674.

The struggle was revived in Henry VIII.'s reign, continued through that of Elizabeth, and only determined in favour of the Court of Chancery in the time of James I., when the combatants for law and equity were respectively the great Lord Coke on one side, and Lord Chancellor Ellesmere on the other (*a*). Since that time, the jurisdiction has never been seriously doubted; and by a recent enactment in the Common Law Procedure Act of 1852 (*b*), the common law court itself is bound to stay proceedings on production of a writ of injunction awarded in equity (*c*).

The technical reasoning on which the right of the Court of Equity to interfere is rested, is probably familiar to most of you. The Equity Court, it is said, interferes in no way with the privileges or prerogatives of the other court; it merely acts on the person enjoined from suing. The other court has perfect power

(*a*) Campbell's Lives of Chancellors, vol. ii. pp. 241—245.

(*b*) 15 & 16 Vict. cap. 76, s. 226. The material words of the section are that "in case any action, suit, or proceeding in any court of law or equity shall be commenced, sued, or prosecuted, in disobedience of or contrary to, any writ of injunction, rule, or order of either of the superior courts of law or equity at Westminster . . . in any other court than that by or in which such injunction may have been issued, or rule or order made . . . the said other court shall stay all further proceedings contrary to any such injunction, rule, or order." In a recent case, *Milburn v. The London & South Western Railway Company*, L. R. 6 Exch. 4, the Court of Exchequer held the 226th section inapplicable where an injunction had been granted by the Court of Admiralty under a statutory enactment giving to that court the powers conferred on the Court of Chancery by the Merchant Shipping Act—a decision grounded, it is conceived, on a literal construction of the words *Superior Courts*, and contrary, it would seem, to the spirit and general intent of the enactments referred to.

(*c*) And where no writ has actually issued, the Court of Law will stay proceedings after an order for an injunction has been made by the Court of Chancery; *Cobbett v. Ludlam*, 11 Exchequer R. 446.

to proceed, though certainly, if the suitor moves a step, he is guilty of contempt towards the Equity Court, and is liable for the consequences.

It may be doubted whether this argument would be tolerated for a moment in any analogous case occurring in every-day life. Suppose, to put a very weak case by way of illustration, two professors, say of law and equity, at a university, both paid by salaries and teaching gratuitously; and imagine one of them advising his pupils not to attend his brother professor's lecture. Could it be contended for a moment, that this constituted no interference with the professorial functions of the other, merely because the inducement to absence assumed the shape of advice to the pupils? The case of the common law courts against equity was infinitely stronger; for the judges, at the period when the struggle took place, were paid by fees from the suitor, and the interference of equity came in the shape of *command*, and not of *advice* (a). The true justification for the interference is to be found, not in the technical "*modus*

(a) The articles of impeachment against Wolsey complain both of his granting *injunctions* after judgement at law, and also of his personally commanding the judges with threats to defer their judgement. The twentieth article ran thus:—"Also the same Lord Cardinall hath examined divers and many matters in the Chancery after judgement thereof given at the Common Law, in subversion to your lawes, and made some persons restore againe to the other party condemned that, that they had in execution, by vertue of the judgement at the Common Law." And the twenty sixth article thus: "Also, when matters have been near at judgement, by proces at your Common Law, the same Lord Cardinall hath not only given and sent injunctions to the parties, but also sent for your judges and expresly by threats commanding them to defer the judgement, to the evident subversion of your lawes, if the judges would so have ceased." See the articles, Coke, 4 Inst. cap. 8.

operandi," but in the substantially just and beneficial nature of the interference itself.

It is however important that the reasoning in support of the jurisdiction should be borne in mind, because the unlimited extent of the jurisdiction itself hinges thereon. The Court acts upon the person, and upon the person only : therefore, if the party accused of inequitable proceedings in some other court be within its reach, it will restrain his proceedings, whether that other court be a court of common law, or the Ecclesiastical Court (*a*), or the Court of Admiralty (*b*), or a Court of Scotland (*c*), or Ireland (*d*) ; and the principle obviously extends equally to proceedings in any foreign court (*e*).

But it is time that we should pass to the consideration of that class of injunction suits with which we are on the present occasion more immediately concerned, viz. those in which equity interferes to restrain the commission of acts either unlawful or wrongful in the eye of a court of equity. In cases of this class, "*injunction*" may be said to be the strong arm of preventive justice, whether in reference to *equitable* or to

It is instructive to notice how these two things—which, according to our present notions, were, the *first* clearly within his jurisdiction as Chancellor ; and the *second*, a gross excess of it—appear to have been at that day equally regarded as grievances.

(*a*) *Hill v. Turner*, 1 Atkyns, 516.

(*b*) *Glascott v. Lang*, 3 Mylne & Craig, 451.

(*c*) *Jones v. Geddes*, 1 Phillips, 724 ; *Graham v. Maxwell*, 1 Macn. & Gor. 71.

(*d*) *Lord Portarlington v. Soulby*, 3 Mylne & Keen, 104.

(*e*) See Lord Brougham's observations at 3 Mylne & Keen, 107, upon the case of *Love v. Baker*, 2 Freeman, 125 ; 1 Chancery Cases, 67.

legal rights, though our present concern is with legal rights only.

In our common law system, as it stood previously to recent legislative enactment (a), preventive justice was practically unknown. A man might be on the point of committing the most flagrant legal wrong : your only course at law was to wait patiently and sue him for 'damages. It was not always so. So late as Lord Coke's time, preventive justice was a part of the common law system. That its importance was fully recognised by him appears from his observations in a passage in the second part of his *Institutes*, respecting the writ of "*Estrepement*," a common law process for preventing waste. Lord Coke says : " This was an excellent law, " for *præstat cautela quam medela*, and preventing " justice excelleth punishing justice" (b).

And in the first Institute (c) we find the following enumeration of writs of a preventive character :—

" And note, that there be six writs in law, that may " be maintained, *quia timet*, before any molestation, " distresse, or impleading ; as, 1, A man may have his " writ of *mesne* (whereof Littleton here speaks) before " he be distreyned. 2. A *warrantia cartæ*, before he be " impleaded. 3. A *monstraverunt* before any distresse " or vexation. 4. An *audita querela*, before any execu- " tion sued. 5. A *curia claudenda*, before any default " of inclosure. 6. A *ne injustè vexes*, before any dis- " tresse or molestation. And these be called *brevia* " *anticipantia*, writs of prevention."

(a) i. e., 17 & 18 Vict. cap. 125, ss. 79, 80, 81. See p. 304, *post*.

(b) 2nd Institute, 299.

(c) 100 a.

But these writs, except that of *audita querela*, have long since fallen into desuetude ; and the 36th section of the Statute of Limitations (a) includes amongst the forms of real action thereby abolished the writs of *mesne*, of *warrantia cartæ*, and of *ne injustè vexes* ; so that these last have ceased to own even that slight shadowy legal existence which they formerly possessed.

But while the law had become thus helpless to anticipate and prevent wrong, the germ of preventive justice lay involved in the maxim, “Equity acts *in personam*,” ready for development as occasion might require ; and as equity interfered by *injunction* to prevent the courts of law from being made the instruments of injustice, so it interfered by means of the same process to supply their want of power to afford preventive justice.

It is of the process of injunction, as granted by the equity courts in aid of the legal right—of injunction, I may say without much inaccuracy, as a head of *auxiliary* jurisdiction (b)—that I am now about to speak.

The injunction suits falling within this limited range are mainly of some one of the following classes :—

1. Patent cases.
2. Copyright cases.
3. Cases relating to Trade Marks.
4. Cases of Nuisance.
5. Cases of Waste.

(a) 3 & 4 Will. IV. cap. 27.

(b) By the operation of Rolt's Act, see note at page 291, *infra*, the jurisdiction of the Court in the classes of cases discussed has in effect become concurrent.

1 and 2.—It will be convenient to consider *Patents* and *Copyright* together.

The history of *Patents* is intimately connected with that of the old abuse of Monopolies. Our earlier sovereigns arrogated to themselves the right of conferring upon particular individuals the sole and exclusive right of buying, selling, or making particular articles of sale or manufacture. This right was exercised so abusively, that by the end of Elizabeth's reign a large number of useful manufactures and trades had become exclusively monopolized by persons able to command court favour. However, in the case of Monopolies (*a*), decided in the last year of Elizabeth's reign, the judges held that a grant of the sole making of playing-cards within the realm, which was an *ancient* manufacture, was bad, as contrary to common law.

But, although monopolies affecting old manufactures were thus void, the king had always the power of granting monopolies of *new inventions*, as the chief guardian of the common weal, for the sake of the public good (*b*); and in the twenty-first year of James I.'s reign the rights of the sovereign and of the public were, by statutory enactment, placed on a foot-

(*a*) 11 Reports, 85: The facts of the case aptly illustrate the practices and manners of the time. The grant was to *Edward Darcy*, a Groom of the Privy Chamber to Queen Elizabeth; and in justification of a privilege of *importing* playing-cards, also purported to be conferred, it contained a recital of the Queen's desire that her subjects should apply themselves to husbandry, and not make playing-cards; since by making such a multitude of playing-cards, card playing had become more frequent, and especially amongst servants, and apprentices, and poor artificers.

(*b*) See Case of Monopolies.

ing not differing very much from that existing at common law.

By the statute in question (*a*), after declaring monopolies to be contrary to law, it was by the sixth section declared and enacted as follows :—

“ Provided also, and be it declared and enacted,
“ that any declaration before-mentioned shall not
“ extend to any letters patents and grants of privilege
“ for the term of fourteen years or under, hereafter
“ to be made of the sole working or making of any
“ manner of new manufactures within this realm, to
“ the true first inventor and inventors of such manu-
“ factures, which others, at the time of making such
“ letters patents and grants, shall not use, so as also
“ they be not contrary to the law, nor mischievous to
“ the state, by raising prices of commodities at home,
“ or hurt of trade, or generally inconvenient: the
“ said fourteen years to be accounted from the date of
“ the first letters patent or grant of such privilege
“ hereafter to be made, but that the same shall be of
“ such force as they should be if this Act had never
“ been made, and of none other.”

This section of the Act of James, as amended and extended by subsequent enactments (*b*), still forms the basis of our present system.

Patent right is therefore a privilege derived from the original power of the Crown as restrained by statutory enactment.

(*a*) 21st Jac. I. cap. 3.

(*b*) The 5 & 6 Will. IV. c. 83; 2 & 3 Vict. c. 67; 7 & 8 Vict. c. 69; and 15 & 16 Vict. c. 83, are the principal Acts applicable to patents.

Copyright, so far as respects the *origin* of the species of property called by that name, has long been the *crux* of lawyers, indeed one might say of the educated community at large. Much confusion has been caused by the word being used in two senses. It includes, or has been used to include, first, though somewhat inaccurately, the right of the author to publish or not, and to restrain others from publishing; and, secondly, the right *after publication* of republishing and restraining others from doing so. The first species of copyright, that existing before publication, according to the strong preponderance of authority, existed at common law. Whether the second species of copyright had any common law existence is the question about which the greatest lawyers have differed. In the great case of *Donaldson v. Beckett* (a), decided by the House of Lords in 1774, ten judges against one were of opinion that copyright existed at common law; though six to five were of opinion that whatever right of action an author might have had after publication, was taken away by the statute of Anne, the first Copyright Act (b)—in fact, that the author's claim was, since that statute, only under the statute. In the recent case of *Jefferys v. Boosey* (c), also before the House of Lords, the question was incidentally reopened. Of the ten judges who were called to the assistance of the House on that occasion, three (d)

(a) 4 Burrow, 2408.

(b) 8 Anne, cap. 19.

(c) 4 House of Lords' Cases, 815.

(d) Parke, B.; Pollock, C.B.; and Jervis, C.J.C.P.

expressed themselves to be of opinion that no copyright ever existed at common law, three (a) that it did exist, and four (b) declined expressing an opinion on the point. Of the three noble lords who moved the judgement of the House, the Lord Chancellor (Lord Cranworth) gave no opinion, while Lord Brougham and Lord St. Leonards both expressed themselves strongly of opinion that no copyright ever existed at common law.

But, passing by this question, however interesting, and omitting for the moment all notice of the common law right of the author before publication, let us consider the position and remedies *at law*, irrespectively of late enactment, both of the patent right owner and of the copyright owner, when their rights are invaded. An unscrupulous competitor infringes a patent, or pirates a book. What then? the only remedy was by an action, in which damages were recoverable; yet the wrong-doer might be a man of straw, and the verdict therefore valueless; or he might be perversely litigious, and prepared to renew the contest even at the expense of his purse; or the jury on the first occasion might give such moderate damages as to make a repetition of the offence a good pecuniary speculation—still the law remained helpless.

Under these circumstances, a bill in equity for an *injunction* afforded that protection which the law was unable to give.

But as the equity court acted in aid merely of the

(a) Erle, J.; Wightman, J.; and Coleridge, J.

(b) Crompton, J.; Williams, J.; Maule, J.; and Alderson, B.

legal right, so in its course of action it always kept in sight the fact that its functions were really *auxiliary* only. The best exposition of the principles by which equity courts were guided in this class of cases is, so far as I am aware, that contained in Lord Cottenham's judgement in *Saunders v. Smith (a)*, a case of copyright :—

“ This court exercises its jurisdiction, not for the purpose of acting upon legal rights, but for the purpose of better enforcing legal rights, or preventing mischief until they have been ascertained. In all cases of injunctions in aid of legal rights—whether it be copyright, patent right, or some other description of legal right, which comes before the court—the office of the court is consequent upon the legal right ; and it generally happens that the only question the court has to consider is, whether the case is so clear and so free from objection upon the grounds of equitable consideration, that the court ought to interfere by injunction, without a previous trial at law, or whether it ought to wait till the legal title has been established. That distinction depends upon a great variety of circumstances, and it is utterly impossible to lay down any general rule upon the subject by which the discretion of the court ought in all cases to be regulated.”

(a) 3 Mylne & Craig, 711, see p. 728.—The alterations in the practice of the Court, resulting from recent legislative enactment, will be found noticed at p. 291 *infra*. The intermediate portion of this lecture is now useful to a student, only as conveying information respecting the former practice, a knowledge of which is essential to the understanding of the recent decisions.

In a subsequent case (*a*), where the bill was one to restrain an alleged infringement of patent right, the same learned lord thus expressed himself:—

“ The jurisdiction of this court is founded upon legal rights ; the plaintiff coming into this court on the assumption that he has the legal right, and the court granting its assistance upon that ground. When a party applies for the aid of the court, the application for an injunction is made either during the progress of the suit, or at the hearing ; and in both cases I apprehend great latitude and discretion are allowed to the court in dealing with the application. When the application is for an interlocutory injunction, several courses are open ; the court may at once grant the injunction—*simpliciter*, without more—a course which, though perfectly competent to the court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff’s title ; or it may follow the more usual, and, as I apprehend, more wholesome practice in such a case, of either granting an injunction and at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the meantime keeping an account.”

Lord Cottenham here points out the three most common courses as being:—

1. Injunction simply.

(*a*) *Bacon v. Jones*, 4 Mylne & Craig, 433, see p. 436.

2. Injunction with a direction that plaintiff proceed to establish his title at law (*a*).

3. Bill retained for a limited time in order that plaintiff may establish his title at law, the defendant keeping an account in the meantime (*b*).

As respects the second course, which implies the existence of some doubt on the part of the court respecting the legal title of the plaintiff, the practice at the present day would be to require an undertaking from the plaintiff to abide by any order the court might think fit to make as to damages, in the event of the plaintiff failing to establish his right at law (*c*).

As respects the third course, the allusion to the defendant keeping an account may demand a few words of explanation. Obviously, if the injunction be not granted, the defendant will continue the acts of alleged infringement or piracy; and should they in event prove to be either infractions of the plaintiff's patent right, or piracy of his copyright, the defendant ought to hand over to the plaintiff the fruits of his wrongful acts. It is with this view that the court, where the

(*a*) The equivalent under the modern practice, see note, p. 291, would be the granting of an interlocutory injunction upon special terms as to bringing the cause to a speedy hearing. Another and common mode of dealing with cases in which the court inclines to the view that the plaintiff is right, is to let the matter stand over until the hearing of the cause, upon the plaintiff undertaking not to continue the acts complained of, or such of them as the court thinks ought to be restrained, pending the trial of the question of right; see *Walker v. Brewster*, L. R. 5 Eq. 25, at p. 26.

(*b*) The modern equivalent to this course is simply a refusal of the injunction, reserving the costs of the motion until the hearing of the cause.

(*c*) Or now, in the event of the plaintiff failing to obtain a decree at the hearing of the cause.

injunction is not granted, commonly requires the defendant to undertake to keep an account until the legal right is ascertained.

The decisions in regard to the course to be taken by the court with respect to withholding or granting the injunction, are extremely numerous; but, as intimated by Lord Cottenham in the case first cited, no general rule can be looked for. The substantial question always is, What course will, on the whole, be least likely to lead to wrong? Will the plaintiff be most likely to suffer wrong, if the injunction be *withheld*, or the defendant, if the injunction be *granted*? and in reference to the question whether the injunction shall be granted or withheld, the pecuniary ability of the defendant to answer any damages that may be awarded against him, is not without relevance (a).

Where the plaintiff's claim is in respect of a *patent*, two main questions are commonly raised, viz.: first, as to the validity of the plaintiff's patent; and, secondly, whether there has been an infringement. In reference to the first question, the length of enjoyment under the patent has always considerable weight with the court upon the point of withholding or granting the injunction. The practice of the court (with the grounds for it) was recently thus stated by Lord Justice Turner, when Vice-Chancellor: "When the patent is new, the public, whose interests are affected by the patent, have had no opportunity of contesting the validity of the patentee's title, and

(a) *Newall v. Wilson*, 2 De Gex, Macn. & Gor. 282.

“ the court refuses to interfere until his right has
 “ been established at law. But in a case where there
 “ has been long enjoyment under the patent (the
 “ enjoyment of course including use), the public have
 “ had the opportunity of contesting the patent, and
 “ the fact of their not having done so successfully
 “ affords at least *prima facie* evidence that the title
 “ of the patentee is good, and the court interferes
 “ before the right is established at law ” (a).

Where the plaintiff seeks the protection of equity in respect of *copyright*, the granting or withholding the injunction seldom turns in any degree on the question of enjoyment. Occasionally a dry question of law arises respecting the plaintiff's title to copyright (b), but more frequently the material question is piracy or no piracy.

In reference to the question of the practice of the court in granting or withholding injunctions, I would call your attention to a section in the Chancery Procedure Act of 1852 (c), which, as it seems to me, ought to have led to considerable alteration in the practice, but which, so far as I am aware, has been little acted upon; I mean the 62nd. It is in these words :—

“ In cases where, according to the present practice
 “ of the Court of Chancery, such court declines to
 “ grant equitable relief until the legal title or right

(a) *Caldwell v. Vanvliessen*, 9 Hare, 424.

(b) *e.g.* *Low v. Routledge*, 33 Law Journal Rep. (N. S.) Chanc. 717; on appeal L. R. 1 Ch. App. 42.

(c) 15 & 16 Vict. cap. 86.

“ of the party or parties seeking such relief shall have
 “ been established in a proceeding at law, the said
 “ court may itself determine such title or right with-
 “ out requiring the parties to proceed at law to
 “ establish the same.” Of course you notice that the
 enactment is *permissive* merely; and, no doubt, in a
 considerable number of injunction cases the issues
 raised between the parties are of a nature more fitted
 for trial before a jury than by a single judge; but cer-
 tainly the new powers conferred by it on the court
 have not been very liberally exercised (a).

(a) The permissive enactment above referred to has since been made compulsory in a more extended form, by the 25 & 26 Vict. c. 42, commonly known as Rolt's Act; which enacts that, whether the title to a relief or remedy be or be not dependent on a legal right, every question of law or fact cognizable in a Court of Common Law, on which the title to relief or remedy depends, shall be determined by the Court of Equity. The Act contains three exceptions to its general operation. The first reserving the right of the court to direct an issue to be tried at the assizes, or in London or Middlesex. The second to the effect that where the object of the suit is to recover or defend the possession of land, relief shall be given only in accordance with rules and practice of the court before the Act. (See *Metropolitan Board of Works v. Sant*, L. R. 7 Eq. 197; *Slade v. Barlow*, L. R. 7 Eq. 296.) The third, exempting the court from any obligation to grant relief where a Court of Law has concurrent jurisdiction if it shall appear that the matter has been improperly brought into equity. By the effect of this Act in nearly all the cases discussed in the lecture the ultimate decision of the question of legal right has been transferred from law to equity. There was at first some hesitation on the part of the Equity Judges as to removing from the consideration of a jury certain cases, such as those of nuisance, which were considered peculiarly fitted for determination by a jury (see *Eaden v. Firth*, 1 Hemming & Miller, 573), but the hesitation has since disappeared (see *Inchbald v. Robinson*, L. R. 4 Ch. App. 388, *Roskell v. Whitworth*, L. R. 5 Ch. App. 459), and the trial is now commonly before the court itself, and without a jury (as to which the student may refer to 21 & 22 Vict. cap. 27), the assistance of which has been but little resorted to, except in patent cases.

Finally, let me observe, in reference to both *patent* and *copyright* cases, that although the jurisdiction exercised by the court is in aid of the legal title, and although in by far the larger proportion of cases the plaintiff in equity comes asserting a legal title, it is equally clear, both upon principle and authority (*a*), that a person having an equitable interest in a patent-right or copyright is entitled to have that interest protected. But obviously his equitable interest can stand on no higher ground than the legal title out of which it is derived; so that the court in interfering in aid of an equitable title, where the legal title from which it flows is disputed, must be governed, in granting or withholding an injunction, by principles similar to those which prevail where the plaintiff comes upon a purely legal title.

And now a few words respecting that species of right, often, though somewhat inaccurately, referred to under the general term "*Copyright*," viz., the author's rights in regard to the productions of his own mind previously to publication.

It would be obviously monstrous to allow any person, who might either accidentally or surreptitiously have obtained a copy of the contents of another's writings, to publish those writings against his will.

But the author's rights do not stop here. Suppose the author himself to give a copy of his work to a friend, or to allow that friend to make a copy. The latter does not thereby acquire a right to publish the work. He must make no other use of his copy than the author

(*a*) *Mawman v. Tegg*, 2 Russell, 385.

may be fairly supposed to have intended him to make ; and in the absence of direct evidence it will not be presumed a right of publication was intended to be conferred. This was the very point decided in the case of the *Duke of Queensberry v. Shebbeare* (a), in which an injunction was granted at the instance of Lord Clarendon's executors to restrain the publication of the *History of the Rebellion* by a person who, with the permission of Henry, Earl of Clarendon, the son and administrator of the great historian, had made a copy of the original MSS.

Upon a similar principle it is held, that a person who writes and sends a letter to another does not convey to the latter an unqualified property, entitling him to publish it. The letter is addressed to him that he may read it, and not that he may print and publish it.

Accordingly, in the leading case of *Pope v. Curl* (b), Lord Hardwicke restrained the defendant from publishing any letters written by Pope, though refusing to restrain the publication of letters written to him.

So in the more recent case of *Thompson v. Stanhope* (c) the widow of Lord Chesterfield's son was, at

(a) 2 Eden, 329.

(b) 2 Atkyns, 341.

(c) Ambler, 737. See, also, *Gee v. Pritchard*, 2 Swanston, 402. The student may with advantage refer to and distinguish the decisions which establish that if a person write and publish a work of fiction any other person has a right to dramatize it, and cause the drama to be acted (see *Reade v. Conquest*, 9 Common Bench N. S. 755), though not to print the drama and publish it ; *Tinsley v. Lacy*, 1 Hemming & Miller, 747. And before the Dramatic Copyright Acts even a published drama might be adapted to representation, and put on the stage for profit, without the

the suit of Lord Chesterfield's executors, restrained by Lord Apsley, Chancellor, from publishing Lord Chesterfield's letters to his deceased son, which had been allowed to remain in the widow's possession.

The same principle applies equally to an *oral* communication which is presumably made for a qualified purpose. Hence, in the case of the farce of "Love à la Mode," written by Macklin, it was held that the proprietors of a magazine had no right to employ a person to take down the words of the play and publish it (*a*). And similarly in more modern times, it was held, in the case of Mr. Abernethy's Lectures, that pupils attending lectures delivered orally, though entitled to take notes for their own use, have no right to publish the contents of those lectures (*b*).

Finally, whenever there has been any conduct partaking of breach of confidence, the court will go even further in protecting the rights of authorship before publication. Thus, in the celebrated case of her present Majesty's Etchings, where impressions had been obtained surreptitiously, the parties into whose hands the impressions had come were restrained, not

author's consent : *Murray v. Elliston*, 5 Barnewall & Alderson, 657. These decisions rest on the principle that the author's privilege under the General Copyright Acts is limited to the multiplication of copies, and that any one may make what use he pleases of a published work so long as he does not multiply copies. If, however, an author first publishes a play, and then turns the play into a novel containing the same incidents, his copyright in the play will be protected against piratical imitations, even though the piracy be from the novel, and not from the play ; *Reade v. Lacy*, 1 Johnson & Hemming, 524.

(*a*) *Macklin v. Richardson*, Ambler, 694.

(*b*) *Abernethy v. Hutchinson*, 1 Hall & Twells, 28.

only from exhibiting the impressions and publishing copies, but even from publishing a catalogue containing an enumeration and descriptive account of those etchings (a).

In reference to the whole of this class of cases of rights of authorship before publication, it is to be observed, that the author's rights very often rest partly upon equitable grounds, and that the question whether an injunction shall go or not is commonly decided by the court itself. In fine, there may be some doubt how far the jurisdiction by injunction exercised in this class of cases can be said to fall within the "*auxiliary*" jurisdiction of the court, though it would have been impossible, without risk of conveying incomplete notions, to have avoided a cursory notice of the authorities.

3. We now pass to *Trade Marks*.

Cases of bills filed by plaintiffs seeking to restrain the fraudulent imitation of *trade marks*, with a view of passing off goods not the plaintiff's as his, are of frequent occurrence. They must be taken to be clearly a branch of *auxiliary* equity.

There is, however, a distinction between these cases and copyright cases, which must be borne in mind. There is no *property* in a trade mark (b) ; the plaintiff

(a) *Prince Albert v. Strange*, 1 Hall & Twells, 1.

(b) This position cannot be maintained in its integrity since the judgments of Lord Westbury in the *Leather Cloth Company (Limited) v. American Leather Cloth Company (Limited)*, 4 De Gex, Jones & Smith, 137 (affirmed on appeal in D.P., 11 House of Lords Cases, 523), and *Hall v. Barrows*, *Ibidem*, 150. In some respects the controversy (as to which see further *McAndrew v. Bassett*, 33 Law Journal (N. S.) Chanc. 561, and

does not come complaining that the defendant has infringed any right of property. The nature of his case is that the defendant has imitated his marks, for the purpose of fraudulently passing off his own goods as the plaintiff's (a). The distinction is not without importance, and it is especially well illustrated by the judgment—not less instructive because humorous—of Lord Justice Knight Bruce, in the case of *Burgess v. Burgess* (b).

In that case the plaintiff, Burgess, who was the father of the defendant, had for many years exclusively sold a particular sauce, well known as “*Burgess's Essence of Anchovies*.” The defendant, the son, after acting for a long time as assistant to his father, at 107, Strand, the father's place of business, set up in trade on his own account in the City, placing over his shop the words,

Ainsworth v. Walmsley, L. R. 1 Eq. 518) may be regarded as verbal rather than substantial.

(a) See the form of declaration at law, *Crawshay v. Thornton*, 4 Manning & Grainger, 357, and *Welch v. Knott*, 4 Kay & Johnson, 747. But although the general nature of trade-mark cases be as stated in the text, fraud on the part of the defendant is not requisite to entitle the plaintiff to a decree in Equity protecting his exclusive right to a trade mark: *Millington v. Fox*, 3 Mylne & Craig, 338; *Burgess v. Hills*, 26 Beavan, 244. The result seems to be that while at law the *scienter* may be essential to enable the plaintiff to recover, such is not the case in Equity. See also *Dixon v. Fawcus*, 30 Law Journal (N. S.) Q. B. 137. See also, as illustrating the distinction between cases of *copyright* and of *trade marks*, *The Collins Company v. Brown*, 3 Kay & Johnson, 423, in which Lord Hatherley (then Vice-Chancellor Wood) decided that a foreign manufacturer has a remedy against a manufacturer here who fraudulently imitates his trade mark, whereas it was recently finally settled in the House of Lords, that a foreigner not resident here had, previously to the recent international Copyright Acts, no copyright in this country.

(b) 3 De Gex, Macn. & Gor. 896.

“*late of 107, Strand,*” and there sold, amongst other goods, a sauce which he called “*Burgess’s Essence of Anchovies.*” On bill filed, Vice-Chancellor Kindersley restrained the defendant from continuing over his shop the words “*late of 107, Strand,*” but refused to restrain him from selling sauces under the name of “*Burgess’s Essence of Anchovies.*” The plaintiff appealed; and on delivering judgment, Lord Justice Knight Bruce expressed himself as follows :—

“ All the Queen’s subjects have a right, if they will,
“ to manufacture and sell pickles and sauces, and not
“ the less that their fathers have done so before them.
“ All the Queen’s subjects have a right to sell these
“ articles in their own names, and not the less so that
“ they bear the same name as their fathers; nor is there
“ anything else that this defendant has done in ques-
“ tion before us. He follows the same trade as that
“ his father follows and has long followed, namely, that
“ of a manufacturer and seller of pickles, preserves, and
“ sauces; among them, one called ‘essence of anchovies.’
“ He carries on business under his own name, and sells
“ his essence of anchovies as ‘Burgess’s Essence of
“ Anchovies,’ which in truth it is. If any circumstance
“ of fraud, now material, had accompanied, and were
“ continuing to accompany, the case, it would stand
“ very differently; but the whole case lies in what I
“ have stated. The whole ground of complaint is the
“ great celebrity which, during many years, has been
“ possessed by the elder Mr. Burgess’s essence of ancho-
“ vies. That does not give him such exclusive right,
“ such a monopoly, such a privilege, as to prevent any

“man from making essence of anchovies and selling it under his own name. Without therefore questioning any one of the authorities cited, all of which I assume to have been correctly decided, I think that there is here no case for an injunction.”

In reference to this class of cases respecting *trade marks*, the practice of the court in granting or refusing injunctions or retaining the bill is substantially the same as in patent or copyright cases. There is a right of action at law, though not in respect of wrong done to any species of property, but in respect of the fraudulent contrivance to pass off goods as and for the plaintiff's.

Accordingly, in a very recent case relating to labels printed in imitation of those commonly used by Johann Maria Farina, the celebrated maker of Eau de Cologne, Lord Cranworth, L.C., not being altogether satisfied that the injunction which had been granted by Vice-Chancellor Wood ought to have gone, retained the bill for a year, with liberty to the plaintiff to bring any action which he might be advised (*a*).

4. The fourth class mentioned as demanding the interposition of equity by injunction, was “cases of *Nuisance*.” These are commonly subdivided into *public* nuisance and *private* nuisance.

The distinction is material in reference to the form of remedy. In cases of *public* nuisance, the remedy is at law by indictment, and in equity by information at the suit of the Attorney-General.

(*a*) *Farina v. Silverlock*, 6 De Gex, Macn. & Gor. 214. See, as to the present practice, note (*b*), p. 288, *ante*.

In those of *private* nuisance, at law by action on the case, and in equity by bill.

It is not always easy to determine whether certain particular acts are a public or merely a private nuisance. In the famous Clapham bell-ringing case (*a*), Vice-Chancellor Kindersley thought that, to constitute a public nuisance, the thing done must be a damage or injury to all persons who came within the sphere of its operation, though of course it might be so in a greater degree to some than others, instancing noxious fumes from a factory, stopping the king's highway. But the particular case before him, viz., of a peal of bells, which might be an intolerable nuisance to a person living close by, yet pleasurable to one living at a distance, could not be thought to constitute a public nuisance. The distinction, however, has become of minor importance so far as respects obtaining redress for private individuals, for the Vice-Chancellor ruled in the same case, that what is a public nuisance, may be also a private nuisance to a particular individual, by inflicting on him some special and particular damage; and that, in that event, the particular individual has his remedy in equity by bill, without making the Attorney-General a party (*b*).

In regard to cases whether of public or of private nuisance, both the grounds for the interference of equity, and the terms on which interference is granted,

(*a*) *Soltau v. De Held*, 2 Simons (N.S.), 133.

(*b*) *Soltau v. De Held*, 2 Simons (N.S.), 145—151. And an action will lie at law; *Iveson v. Moore*, Holt's Rep. 16.

are substantially the same as in *patent* and *copyright* cases.

The remedy at law, in the case of public nuisance by indictment after indictment, and in the case of private nuisance by action after action, is wholly inadequate to answer the ends of justice; and accordingly the Court of Equity, while requiring the most clear proof of the legal right or else carefully providing for its establishment, lends its strong arm to law.

Perhaps one of the happiest illustrations of the beneficial interposition of equity to restrain acts which, if done, would have amounted to a public nuisance, is that afforded by the *Datchet Bridge Case* (a).

There, the bridge lying partly in Berkshire and partly in Buckinghamshire, the *medium filum* of the Thames being the county boundary, and the bridge requiring either repair or rebuilding, the magistrates of the respective counties were unable to agree upon any general plan. Bucks accordingly proceeded to repair its own side; but the difficulty was, how to deal with the centre bay of the bridge. The Bucks engineer ingeniously contrived to lay joists so as to support his half of the centre bay, without direct support from the Berkshire side, but by the aid of supports derived from the old joists over the centre bay, which rested at one end in Bucks and at the other in Berks. Thereupon, the Berkshire magistrates, unwilling to allow such a

(a) *Attorney-General v. Forbes*, 2 Mylne & Craig, 123.

triumph to the opponent county, made an order at quarter sessions for cutting through on their own side the old joists of the centre bay.

An information and bill was filed at the relation of the county treasurer for Bucks to restrain the proposed cutting of the joists; and upon a demurrer being put in, Lord Cottenham, in an able judgment, upheld the jurisdiction of the court.

Under the head of "*private nuisance*" (or of its equivalent, "*public nuisance*," causing special damage to some particular individual) may be ranged a large variety of injuries; the legal remedy for which, by action on the case, would afford most inadequate redress. Amongst these may be mentioned obstructions to free use of light, as by building so as to darken windows (*a*); interference with the free and healthy use of air, as by burning bricks in the neighbourhood of some particular house (*b*); obstructions to free use of water, as by wrongfully diverting or fouling a stream (*c*); obstructions to rights of way, as by cutting a trench across a road (*d*); and disturbance of rest, as by ringing bells of heavy weight at unreasonable times, of which last kind was the case of the Roman Catholic

(*a*) *Herz v. Union Bank of London*, 1 Jurist (N. S.), 127. See *Isenberg v. East India House Estate Company*, 33 Law Journal (N. S.), Chanc. 392; *Johnson v. Wyatt*, Ibidem, 394.

(*b*) *Walter v. Selfe*, 4 De Gex & Smale, 315; *Pollock v. Lester*, 11 Hare, 266. See too *Beardmore v. Treadwell*, 3 Giffard, 683; *Crump v. Lambert*, L. R. 3 Eq. 409.

(*c*) *Wood v. Sutcliffe*, 2 Simons (N. S.), 165.

(*d*) *Spencer v. London and Birmingham Railway Company*, 8 Simons, 193.

chapel at Clapham, before referred to (a) : in all which, and many others, though there be a remedy at law by action on the case, the court will protect the legal right by injunction.

5. My fifth class of cases, "*Waste*," alone remains.

The equitable jurisdiction to restrain waste forms a large and interesting subject, of which only a very small portion falls within the ambit of my present lecture.

There was at common law a form of proceeding by prohibition to stay waste. Subsequently this was abolished by the Statute of Westminster (b). At common law also a writ of *Estrepement* (c) lay after judgment, and before execution, to stay waste ; and by the Statute of Gloucester (d), the operation of this writ was made applicable before judgment where litigation was pending. In other respects the law afforded no protection.

The action of waste gave and gives (for it still lies) none other remedy than that of a punishing or compensating justice.

But equity, in all cases where an "action of waste" would lie, will protect the legal right by injunction, and supply the need of protective justice. Not that you are to suppose that the interference of equity in matters of waste is exercised in aid only of the legal right. On

(a) *Soltau v. De Held*, 2 Simons (N. S.), 133 ; and see *Walker v. Brewster*, L. R. 5 Eq., 25 ; *Inchbald v. Robinson*, L. R. 4 Ch. App. 388 ; *Roskell v. Whitworth*, L. R. 5 Ch. App. 459.

(b) 13 Edward I. stat. 2, cap. 14.

(c) A word signifying extirpation.

(d) 6 Edward I. cap. 13.

the contrary, it has given redress where none could have been obtained at law. Thus, when an estate was limited to A for life, remainder to B for life, remainder to C in fee, and A, during the lifetime of B and C, committed waste, at law B had no remedy by action of waste, because he was tenant for life only, and the damage must have been laid as having been done to the inheritance; and C had no remedy, because his estate was not in possession. Still, in this case, equity from the earliest times interfered and granted an injunction (*a*).

Again, equity interfered, and still interferes, even as against the strict legal rights of tenant for life *without impeachment of waste*, by restraining him from committing wilful destruction, as from pulling down mansion-houses (*b*), or from felling timber planted and left standing for ornament (*c*). But these special interpositions of equity, however interesting a branch of study, form no part of the auxiliary jurisdiction of the court.

Having now pointed out the most important instances of the auxiliary interposition of equity by injunction, it is fitting that I should call your attention to the power recently conferred on the common law courts of granting injunctions.

(*a*) Egerton, Lord Keeper, is reported to have stated, in 41st Elizabeth, Moore, 554, that he had seen a precedent of a decision to this effect, of the time of Richard II. At a later date, *an action on the case in the nature of waste* lay; 2 Saunders' Reports, 252, note (7).

(*b*) Vane v. Lord Barnard, 2 Vernon, 738.

(*c*) Marquis of Downshire v. Lady Sandys, 6 Vesey, 107. See also, Micklethwait v. Micklethwait, 1 De Gex & Jones, 504.

The Common Law Procedure Act of 1854 (*a*) in substance empowers a plaintiff, at any time after action brought, and either before or after judgment, to apply *ex parte* to the common law courts, or a judge, for a writ of injunction, which writ may be granted or denied on such terms as to duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable or just; and, in case of disobedience, the writ may be enforced by attachment.

The new jurisdiction thus conferred may be said, I believe, to be yet on trial; at all events, the reported decisions in reference to its exercise are as yet few in number (*b*).

The path, however, of the common law judges would seem to be tolerably easy. The new jurisdiction is a simple substitute for the auxiliary jurisdiction of the Equity Court, and, if exercised liberally, yet with the same sedulous anxiety exhibited by our equity judges to avoid undue interference with legal rights, it ought, in a large number of cases, to render the assistance of equity needless. Indeed, comparing the 62d section of the Equity Procedure Act of 1852 (*c*), before referred to, with this section of Common Law Procedure Act, the result would seem to be that where the case is one suitable for decision by an equity judge, a bill in equity ought to dispose of the whole matter,

(*a*) 17 & 18 Vict. 125, s. 82.

(*b*) See *Jessel v. Chaplin*, 2 Jurist (N. S.), 931; *Baylis v. Legros*, 2 Common Bench Reports (N. S.), 316; *Sutton v. South Eastern Railway Company*, L. R. 1 Exchequer, 32.

(*c*) 15 & 16 Vict. cap. 86.

including the question of legal right; while, where the circumstances are such that a trial by jury is desirable, an action at law in the first instance, and an application for an injunction to the common law court, will be the proper course (a).

And here I may observe that it is impossible not to recognise the generally beneficial tendency of the late legislation, communicating to the common law court powers formerly possessed only by the courts of equity. Let me sum up shortly what has been recently done for the common law jurisdiction in this respect.

Their procedure has been improved by the powers of discovery and production of documents, mentioned and explained in my sixth lecture. They have been invested with the power of granting injunctions just mentioned. Their powers of proceeding by mandamus have been enlarged (b), though not so as to enable them to decree a specific performance under the name of mandamus (c). Something of the nature of a bill for the delivery up of specific chattels has been imparted to the action of detinue by giving to the common law judge power upon the application of the plaintiff to

(a) The experience of the fourteen years since the above Lecture was delivered shows only a very sparing resort to the new jurisdiction by Injunction at Common Law. This may be partly attributable to the circumstance that the Common Law Courts cannot interfere upon a mere apprehension of wrong. There must be an existing cause of action to found the jurisdiction. But the superiority of the Chancery procedure in respect to interlocutory injunctions, in point of speed and generally, must be regarded as the principal cause of the Common Law jurisdiction remaining unused.

(b) 17 & 18 Vict. cap. 125, s. 68.

(c) *Benson v. Paull*, 2 Jurist (N.S.), 425.

order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining it (*a*), though the efficacy of this clause is somewhat impaired by the absence of any provision other than distress for enforcing the return of the article (*b*). A power has been given enabling a defendant who is sued at law, but has a clear defence in equity, to set up his equitable defence by way of plea (*c*), so that our jurisprudence is rescued from the absurdity of a man recovering on one side of Westminster Hall what he is bound to pay back on the other (*d*); though the common law judges have decided to allow pleas of this kind only where the equity set up is a simple unqualified answer to the action (*e*). Finally, where an action is now brought upon a bill of exchange or other negotiable instrument, the common law court is invested with the old head of equity jurisdiction, which consisted in ordering the loss of the instrument not to be set up upon a proper indemnity being given (*f*).

The bare enumeration of these additional powers suggests naturally to the mind the question of the

(*a*) 17 & 18 Vict. cap. 125, s. 78.

(*b*) In equity there would simply be a decree for return; and in default of obedience the defendant would be committed.

(*c*) 17 & 18 Vict. cap. 125, ss. 83 to 86, which provisions, however, do not apply to an action of ejectment. *Neave v. Avery*, 16 Common Bench Reports, 328.

(*d*) *Note for Student*.—The Court of Chancery used formerly to sit at Westminster.

(*e*) *Wodehouse v. Farebrother*, 5 Ellis & Blackburn, 277.

(*f*) 17 & 18 Vict. cap. 125, s. 87.

feasibility of a fusion of law and equity ; a question far too large for discussion at the present hour, and perhaps altogether too speculative for consideration in a course of elementary lectures (a). It may indeed have occasionally appeared to some of you that I have indulged too freely in matters of mere opinion. The present, however, is certainly not a period at which the law can with advantage be treated dogmatically. These are troublous times, both for jurisprudence and the legal profession. Certainly we lawyers of the present day do not walk in pleasant paths. The shortcomings of the law are freely laid to our charge, and we are expected to make them good.

That the jurisprudence of imperial Rome, based as it was upon a pure despotism (b), should have viewed the legislator as the best expounder of his own laws, need not surprise us. It was, at least, consistent when it is said, “ Vel quis legum ænigmata solvere et “ omnibus aperire idoneus esse videbitur nisi is cui “ soli legislatorem esse concessum est ? ” (c). But that our countrymen of our own age, members of a free community, with whom the severance of the legislative from the judicial functions is, or ought to be, an article of political faith, should fall into a converse error, and call upon our profession to do the work of the legislator, and as a simple act of ordinary duty *to reform the law*, may well excite our astonishment. The injustice of the demand is too obvious to need comment. The duty

(a) See *post* a recent lecture on this subject.

(b) Quod principi placuit legis habet vigorem ; Inst. I. tit. i. l. 6.

(c) Codex, Lib. I. tit. xiv. l. 12.

of the legal profession, as a body, is to *work* the law—and hard enough the work often is—not to *make* the law.

We cannot, however, with propriety disregard altogether the general current of the feelings and convictions of that large community of which our smaller one forms part; and if I have occasionally digressed into matters of opinion respecting either the advantages or possible evils of recent legislation, or the probable good to be hoped for from the hand of amending reform, it has been because I felt and feel that a legal education based upon the dry results of authoritative decision and legislative enactment must fall short of what is fairly due to the spirit of our age.

SUPPLEMENTARY LECTURES.*

ELECTION.

A FIRST general notion of the doctrine of Election will, I think, be better conveyed by a simple example than by any general definition.

A testator seised of Blackacre in fee and Whiteacre in tail devises Blackacre to his eldest son and Whiteacre to the younger, and dies. The eldest son claims Blackacre, as devisee, and Whiteacre (which his father had no legal power to devise) as heir in tail. Thereupon a Court of Equity says, No, you shall make your "*election*" to claim either under or against your father's will. You shall not at the same time that you accept Blackacre as devisee deprive your younger brother of Whiteacre by setting up your paramount title as issue in tail.

This illustration is, in fact, that afforded by an Anonymous Case in Gilbert's Equity Reports, page 15, often referred to, and which, as it is very short, I will proceed to read.

* The following four lectures formed part of a second course delivered in the years 1858—1859.

“ The case was this:—A. was seized of two acres, one
“ in fee, t’other in tail; and having two sons, he, by his
“ will, devises the fee simple acre to his eldest son, who
“ was issue in tail; and he devised the tail acre to the
“ youngest son and dy’d: the eldest son entered upon
“ the tail acre; whereupon the youngest son brought
“ his bill in this court against his brother, that he
“ might enjoy the tail acre devised to him, or else
“ have an equivalent out of the fee acre; because his
“ father plainly designed him something. Lord Chan-
“ cellor.—This devise being designed as a provision
“ for the younger son, the devise of the fee acre to
“ the eldest son must be understood to be with a *tacit*
“ condition, that he shall suffer the younger son to
“ enjoy quietly, or else, that the youngest son shall
“ have an equivalent out of the fee acre, and decreed
“ the same accordingly.”

In the simple instance just put the doctrine and the application of it would probably meet with the approbation of a very large proportion of educated men, whether lawyers or laymen; and yet, on looking closely, it is impossible not to perceive that this decision contains the first step towards an enormous stretch of authority. The Court of Equity, in fact, imports into the will a condition which is not expressed on the face of it. Let me put another case, and you will, I think, at once see what I mean.

Suppose the father entitled to fee simple property of very large value, and to be also entitled as tenant for life to a small outlying property, of which the eldest son is tenant in fee in remainder, situated in a distant

county and in no way connected with the family estate. Under these circumstances the father makes his will devising all his real estate, and also the outlying property of his son, to the first son for life, remainder to his issue in tail, remainder to the second son for life, &c. In this case the doctrine of election equally applies—the first son cannot at the same time claim his life estate under the will and claim his own property against it. Yet it is impossible not to feel that the court may by the application of the doctrine in this case be doing what the testator himself would not have wished to be done.

Before, however, pursuing this matter further, I will indicate shortly the general order I propose to adopt in my discussion this evening.

First.—I shall consider the broad leading principles of the doctrine of election, illustrating them by occasional references to the civil law.

Secondly.—I shall refer to some of the more remarkable classes of decisions establishing that under certain circumstances a case of election does or does not arise.

Thirdly.—I shall add a few words respecting the application of the doctrine to persons under disability.

(I.) Applying ourselves in the first instance to the consideration of the principles of the doctrine, let us revert to the examples before given. What is it that a Court of Equity does when it calls into operation the doctrine of election? It implies a condition where none is expressed. In the case first supposed, to repeat the words of Lord Chancellor Cowper, “the
“devise of the fee acre to the eldest son is under-

“stood to be with a tacit condition that he shall suffer “the younger son to enjoy quietly.” In the secondly supposed case, the Court assumes that the life estate in the whole property settled is conferred conditionally only on the son allowing his own small outlying property to be brought into settlement.

But is this a justifiable implication? The testator has imposed no condition in terms. Is a Court of Equity warranted in importing a condition into his will? The answer to this question involves the inquiry, What was presumably the testator's intention? Now it is obvious that the disposition made by the testator must have been made under one of the following states of circumstances :

(a) Either the testator knew that the property which he assumed to deal with was not his own, and yet he advisedly assumed to give it; or,

(β) He so gave it erroneously supposing it to be his own.*

a.—The first case presents far less difficulty than the second, though (lest any of you should even for a few minutes be left under an erroneous impression) I will say at once that, in our system of equity jurisprudence, the doctrine of election applies equally in each case.

In the first case the testator, conscious of his own want of power, has nevertheless said, I choose this estate which belongs to A. to go as part of my property, and it can hardly be doubted that he relies on the

(*) Whether the erroneous belief was due to want of sufficient information or to momentary forgetfulness, seems immaterial.

benefits which he by his will confers on A. as the inducement to A.'s consenting to ratify his will. Certainly it may be said : " The testator knew the facts, and has " omitted to impose any condition ; why should you " imply one ? " The answer is, he has devised to the devisee on the assumption of the latter's compliance. To give the devisee the estate which the testator had power to dispose of, and to allow him to claim his own by title paramount, would be to frustrate the clear undeniable intention of the testator.

β .—But when we approach the secondly supposed state of circumstances, viz., that the testator *erroneously* supposed that the estate which he has assumed to devise was in fact his own, the difficulty seems far greater (*a*).

Recollect my secondly supposed illustration, viz., that of a testator including in a general devise in strict settlement a small outlying estate of which he was only tenant for life, and his son tenant in remainder in fee. Assume further, that as regards various other small properties, similarly settled, the testator has abstained from affecting to devise them, but that as regards this particular small estate he had included it under the erroneous belief that it was his own. Here it is almost impossible to resist the conviction that—to apply the doctrine of election—to compel the son to bring his own estate into settlement, is not to carry out, but to

(*a*) In a recent case, *Cooper v. Cooper*, L. R. 6 Ch. App. 15, V.-C. Stuart appears to have considered (see his judgment at note 2, page 16 of the Report) that erroneous belief as respects power of disposition was necessary to raise a case of election. But this doctrine was on appeal treated as unsound.

frustrate the wishes which the testator would *probably* have entertained had he known the facts.

It is, however, perfectly clear, that according to our system of jurisprudence, the doctrine of election equally applies. The ground commonly assigned, is that given by Lord Alvanley in his judgment, in *Whistler v. Webster* (a). He there says: “ The question is very short; “ whether the doctrine laid down in *Noys v. Mordaunt*, “ and *Streatfield v. Streatfield*, has established this “ broad principle ; that no man shall claim any benefit “ under a will without conforming, as far as he is able, “ and giving effect, to everything contained in it, “ whereby any disposition is made showing an inten- “ tion, that such a thing shall take place, without “ reference to the circumstance whether the testator “ had any knowledge of the extent of his power, or “ not. Nothing can be more dangerous than to specu- “ late upon what he would have done, if he had known “ one thing or another. It is enough for me to say, “ he had such intention; and I will not speculate, “ upon what he would have intended in different “ cases put.”

I should myself have thought the answer to these observations lay on the surface. The doctrine of election proceeds, or professes to proceed upon intention. Thus, Mr. Swanston in his celebrated note to *Dillon v. Parker* (b), says: “ The foundation of the equitable “ doctrine of election is the intention, explicit or pre- “ sumed, of the author of the instrument to which it

(a) 2 Vesey, jun., 370.

(b) 1 Swanston, 401.

“is applied.” In furtherance of the presumed intention you imply a condition. You assume the testator to say, I give you an interest in my property conditionally on your ratifying the disposition which I have made of your own? But how can the testator be supposed so to speak in a case where, by the hypothesis, he really believes himself to be only dealing with what is his own. The “*intention*” referred to by Lord Alvanley in the words just read, is a different intention altogether, viz., the intention that the devisee shall have a particular estate which the testator professes to devise though it be not his own.

However, that the doctrine of election applies according to our law where the testator erroneously supposes he is dealing with his own property, is a point too firmly settled to admit now of a moment's question. The result would seem to be that the doctrine, though professing to be based upon intention, is wholly independent of it; that the Court *presumes* an intention, on the part of the author of every instrument, that all persons deriving benefits under that instrument shall be bound to give effect to all dispositions thereby made of their own property; and that it will allow no evidence to be given to show that such presumed intention could not really have existed. The doctrine of election thus becomes a positive rule, independent of intention, yet deriving its value from the fact that it is calculated in a large majority of instances to effect the probable intention.

A few words comparing the rules of the civil law, from which our own doctrine of election was un-

doubtedly derived in the first instance, with those of our own jurisprudence, may not be amiss.

According to the testamentary system of the civil law, some person was commonly constituted heir (or, as we should say, devisee), to whom a time was allowed for deciding whether he would accept or renounce the inheritance. If he accepted, he did so subject to all the burdens of debts and bequests which the testator had thought fit to impose. Amongst the burdens thus assumed by the heir was that of procuring for any legatee, or giving to him the value of, any particular subject-matter bequeathed to him which belonged to any third party. Thus a testator said, I bequeath to Claudius the house of Sempronius, situate at Tusculum. If the heir accepted the inheritance, it became his duty either to purchase the house of Sempronius and make it over to Claudius, or, if this was impossible, to pay to Claudius the appraised value of the house.

But this rule applied only where the testator knew that the house was that of Sempronius; and not if he had made the bequest supposing it erroneously to be *his own*. In the Second Book of the Institutes, title xx, s, 4, after explaining the general doctrine of election, to the effect just mentioned, the 5th section continues thus: “Quod autem diximus alienam rem posse legari, ita
“intelligendum est, si defunctus sciebat alienam esse,
“non si ignorabat. Forsitan enim si scivisset alienam
“rem esse, non legasset.”

You will thus observe that the civil law, from which there can be little doubt our own doctrines were derived,

differed most materially from ours in excluding, from the application of election, cases proceeding from an erroneous supposition of the testator (*a*).

Bearing, however, in mind that, in our system, election applies whether the testator was or whether he was not aware that he was dealing with property not his own, let us next proceed to examine a little more closely the nature of the condition inferred. I have hitherto referred to it as a *tacit* condition annexed “that the person owning the property will not dispute the disposition made thereof by the testator.” But this is not all. The form of condition assumed is somewhat more complex. I turn again to the Anonymous Case in Gilbert, where the *tacit* condition is said to be, “that he shall suffer the younger son to enjoy quietly, *or else* have an equivalent out of the fee acre.”

The condition assumed to exist is, therefore, you see, alternative in form. This is immaterial where the donee elects to confirm the will, but what is the effect where he elects to take against it? Why, the Court lays hold of the property given to him, and sequesters it for the purpose of making compensation to the disappointed legatee to whom the property of the electing party was bequeathed, in respect of the loss which he has sustained by the withdrawal of that property from the operation of the will.

(*a*) The French code, rejecting altogether the doctrine of election, provides, Cod. Civ. § 1022, as follows :— “Lorsque le testateur aura légué la chose d'autrui, le legs sera nul, soit que le testateur ait connu, ou non, qu'elle ne lui appartenait pas.”

This, you will observe, is a still higher stretch of authority than that hitherto supposed to be exercised.

The tacit condition inferred is not merely “you shall confirm or forfeit,” for if this were so, then, upon failing to confirm, the forfeited property would have sunk into the bulk of the testator’s estate for the benefit of the heir or residuary legatee; but is, “You shall confirm, or, out of the property given to you by the testator, make a compensation to the person whom you disappoint”(a).

The doctrines of the Court on this point, together with the extreme difficulty of reconciling them with strict principles of construction, are thus forcibly pointed out by Sir Thomas Plumer in the case of *Gretton v. Haward* (b):—

“ Few cases are to be found on the subject, but it must be acknowledged that the language of the great judges by whom it has been discussed, proceeds to the extent of ascribing to the Court an equity to lay hold on the estate thus taken from the devisee by the principle of election, and dispose of it in favour of those whom he has disappointed; not merely taking it from one, but, such is the uniform doctrine, bestowing it on the other. A doctrine not confined to instances in which the heir is put to election, and which may be said to bring him within the operation of the general principle, but prevailing as an uni-

(a) Upon the question whether “compensation” forms part of the Scotch doctrine of “Approbate and Reprobate,” see Bell’s Commentaries, 6th edition (by Shaw), page 68.

(b) 1 Swanston, 423.

“ versal rule of equity, by which the Court interferes
 “ to supply the defect arising from the circumstance
 “ of a double devise, and the election of the party to
 “ renounce the estate effectually devised ; and instead
 “ of permitting that estate to fall into the channel of
 “ descent, or to devolve in any other way, lays hold of
 “ it, to use the expression of the authorities, for the
 “ purpose of making satisfaction to the disappointed
 “ devisee : a very singular office ; for in ordinary
 “ cases, where a legatee or devisee is disappointed,
 “ the Court cannot give relief ; but here it inter-
 “ poses to assist the party whose claim is frustrated
 “ by election. Such is the language of Lord Chief
 “ Justice *De Grey*, cited with approbation by Lord
 “ *Loughborough* ; ‘ the equity of this Court is to se-
 “ ‘ quester the devised estate *quousque* till satisfaction
 “ ‘ is made to the disappointed devisee.’ I conceive
 “ it to be the universal doctrine that the Court pos-
 “ sesses power to sequester the estate till satisfaction
 “ has been made, not permitting it to devolve in the
 “ customary course. Out of that sequestered estate
 “ so much is taken as is requisite to indemnify the
 “ disappointed devisee ; if insufficient, it is left in his
 “ hands. In the case to which I have referred, Lord
 “ *Loughborough* uses the expression that the Court
 “ ‘ lays hold of what is devised, and makes compen-
 “ ‘ sation out of that to the disappointed party.’ ”

* * * * *

“ It would be too much now to dispute this prin-
 “ ciple, established more than a century, merely
 “ on the ground of difficulty in reducing it to

“ practice, and disposing of the estate taken from the
“ heir-at-law without any will to guide it; for to this
“ purpose there is no will; the will destined to the
“ devisee, not this estate, but another; he takes by
“ the act of the Court (an act truly described as a
“ strong operation); not by descent, not by devise,
“ but by decree; a creature of equity.”

These observations of Sir Thomas Plumer lead me naturally to the consideration of the much-vexed question whether, where an election is made to take against the will, the principle to be adopted in adjusting the rights of the parties be forfeiture or compensation; that is to say, whether a person electing to take in opposition to the terms of an instrument forfeits absolutely all benefit thereunder, or only, as Sir Thomas Plumer has expressed it, so much as is requisite to indemnify the disappointed devisee.

At first blush it might seem unaccountable that a question so fundamental should remain unsettled at the present day. But, on consideration, you will see that circumstances calling for a decision are not very likely to arise. In deciding to elect to take either against or under a will, the person bound to elect will, in the very large majority of cases, be influenced only by his pecuniary interest. If the property bequeathed to him be more valuable than his own, he elects to take under the will; if less valuable, it matters little whether the principle be forfeiture or compensation, since the whole subject-matter is insufficient to answer the claim of the disappointed legatee. It is, however, easy to suppose a case calling for a decision, and per-

haps it is strange no such case should hitherto have arisen. Thus a testator bequeaths a sum of £100,000 to A., and devises to B. an old family estate of far less value of which he (the testator) is tenant for life only, with remainder to A. Here A., having a special affection for the family property, may elect to take it, and then the question arises, does A. forfeit the whole £100,000, or so much only of that amount as is equal to the family estate which he has taken in opposition to the will? Upon this point I must, for lack of time, content myself by referring you to Mr. Swanston's note to the case of *Gretton v. Haward* (a), and to the more recent authorities referred to in Jarman on Wills (b). You will, I think, be perfectly safe in assuming that *compensation*, and not *forfeiture*, is the rule.

The only remaining question of general principle in reference to the doctrine of election is one as to which no reasonable doubt really exists, but to which I advert chiefly that I may recommend to your perusal Mr. Swanston's able note on the subject (c). I mean the question whether the doctrine of election be a purely equitable doctrine, or, as Lord Mansfield on one occasion (and indeed even Lord Redesdale on another (d)) contended, a doctrine of law as well as of equity. It would be vain to attempt to paraphrase the beautifully cogent argument of Mr. Swanston in

(a) 1 Swanston, 433, note (a).

(b) Vol. I., p. 373 (2nd edition) ; pp. 417, 418 (3rd edition).

(c) 1 Swanston, p. 425.

(d) *Birmingham v. Kirwan*, 2 Schoales & Lefroy, 444 (see p. 450).

the note just alluded to. You cannot do better than study it with the utmost care. There can be no doubt that the doctrine is a purely equitable doctrine. Most commonly indeed it is called into operation in the course of some matter in which the Court has already acquired jurisdiction—as where suit has been instituted for the administration of a testator's estate, and the question incidentally occurs whether a case of election arises upon the will. Occasionally, however, the circumstances calling for the application of the doctrine constitute the sole reason for coming into equity, and then in truth the doctrine becomes really a head of equity jurisprudence.

The case of *Green v. Green* (a) was a case of this kind. There, by a settlement on the marriage of Edward Green with Elizabeth Green, the plaintiff, certain estates to which Edward Green was entitled as tenant in tail in remainder, were expressed to be settled (but without effectually barring the estate tail), as to part to the use of Edward Green for life, remainder to the plaintiff for life, remainder to the first and other sons of the marriage, and as to part to the use of Edward Green for life, remainder to the first and other sons, &c., immediately on the determination of his life estate. Other estates, to which the plaintiff was entitled in fee simple, were by the same settlement conveyed to similar uses. Upon the death of Edward Green, the defendant Edward Henry Green (his only son and heir-at-law) entered on the estates

(a) 2 Merivale, 86. See, also, *Brown v. Brown*, L. R. 2 Eq. 481, and cases there cited.

to which he was entitled as tenant in tail in possession under the settlement, and treating the settlement as ineffectual to bind the estates to which his father was entitled as tenant in tail at the time of the settlement, brought ejectment to recover those portions thereof in which the plaintiff took a life estate by the settlement, and into which she had entered as tenant for life. The widow thereupon filed her bill, and an injunction was granted on the ground of election, to restrain the defendant from proceeding with the ejectment.

The facts of the case just referred to suggest the observation that the doctrine of election applies just as much to double claims under and against a settlement or other instrument as under or against a will. I have hitherto, in the illustrations selected and in the language used, treated the doctrine as arising exclusively upon testamentary instruments, and this, partly because a very large proportion of the cases of election which arise, do in fact arise upon wills, and partly for the sake of brevity. You have only to recollect that where I have used the word "testator," the more comprehensive expression "author of the trust" might have been more correct, though less intelligible; and that where I have spoken of "wills" my observations apply to all instruments. I would further add, that for the sake of convenience I shall throughout the remainder of my lecture adopt generally the same limited phraseology as hitherto.

(II.) I now pass to the second division of my task, viz., the mention of some of the more remarkable

classes of decisions establishing that under certain circumstances the doctrine of election does or does not apply.

In reference to questions of this kind the leading rule is, that you must find on the face of the will a clear intention on the part of the testator to dispose of the property which is not his own. In this sense, the intention, as evidenced by the words of the will, is all important. Bear in mind, however, that this intention is very different from the presumed intention which has been so frequently referred to as forming the groundwork of the doctrine of election. The latter is the presumed intention of the testator that the legatee, whose own property has been devised away, shall elect. The intention now under consideration is merely the intention of the testator, as apparent on the face of the will, to deal with any particular property.

Here the rule is, that if the testator's expressions admit of being restricted to property belonging to himself, they will not be applied to property over which he has no disposing power.

Two very apt illustrations of the application and non-application of this general rule are afforded by the two cases of *Dummer v. Pitcher* (a) and *Shuttleworth v. Greaves* (b).

In the first the testator's will ran thus : " I bequeath " the rents of my leasehold houses and the interest of " all my funded property or estate."

The testator had in fact no funded property at the date of his will, but there was funded property standing

(a) 2 Mylne & Keen, 262.

(b) 4 Mylne & Craig, 35.

in the joint names of himself and of his wife. After his death the wife claimed by right of survivorship the funded property standing in the names of her husband and herself, and therefore, as she took benefits under the will, it was contended that she ought to elect to give up either those benefits or the funded property.

Lord Brougham (affirming the judgment of the late Vice-Chancellor of England) held, that, although the testator had no funded property at the date of his will, his words might well be understood as applying to funded property at the date of his death, and that therefore he was not to be regarded as intending to dispose of the funded property standing in the joint names of himself and his wife, and consequently that no case of election arose.

On the other hand, in the second case referred to, *Shuttleworth v. Greaves*, where the testator said, "I bequeath all my shares in the Nottingham Canal Navigation," the words used were held to refer specifically to shares actually in existence at the date of the will, and the testator having no such shares of his own, but having shares standing in the joint names of himself and his wife, it was held the words of bequest raised a case of election as against the wife.

To the same general rule may be referred the class of cases establishing that where a testator is entitled to property, subject however to a charge or incumbrance, and he devises it, distinctly describing it, and giving at the same time other property to the incumbrancer, no case of election is raised. The testator is viewed as devising only the property subject to the charge.

So, again, where a testator devises land out of which his widow is dowable, and dies, having bequeathed to her benefits by his will, the rule is clearly settled that the widow is not bound to elect unless you can discover on the face of the will an intention to deal with the property in such a manner as would be inconsistent with her dower being set out to her by metes and bounds.

What circumstances are or are not tantamount to such an inconsistency is often a question of considerable difficulty. A power of sale or a trust for sale has generally been treated as not inconsistent. The trustees, it is considered, may well dispose of the testator's interest in the property subject only to the widow's right of dower. On the other hand, a general power of leasing or of management affecting the whole of the lands is almost necessarily inconsistent with the notion of the widow's personally enjoying her one-third, and therefore, where a power of this kind is conferred by the testator, a case of election will be generally raised. The mass of reported decisions in reference to the obligation of the widow to elect is, however, such that it would be hopeless to attempt even a cursory survey. You may form some notion of its magnitude when I inform you that on the argument before the Lords Justices in one of the most recent cases (*a*) no fewer than thirty-three cases were cited.

Again, the same general pervading principle, that to raise a case of election the intention of the testator to dispose of what is not his own must be perfectly

(*a*) *Parker v. Sowerby*, 4 De Gex, Macn. & Gor. 321.

clear, may be traced in the class of cases deciding that where a testator has a partial interest in property, as, for instance, a remainder in fee (a), and he disposes of the property by name, he is to be regarded as intending to dispose only of his partial interest and not of the whole fee simple.

Of course, however, the whole tenor of the will is to be carefully considered, and if it appear, as the result of such consideration, that the testator did in fact intend to deal with the whole fee, then the will may well suffice to raise a case of election as against any person interested in the property, and taking a benefit under the will. You will find a very instructive instance of a case of election being thus raised in the recent case of *Wintour v. Clifton* (b).

Let me now direct your attention to a cluster of classes of cases all differing in one main particular from the cases of election hitherto discussed.

I refer to the instances in which a question of election is raised, not by reason of a testator having assumed to dispose of property *not his own*, but by reason of his having attempted to dispose of some portion of his *own property* by an instrument ineffectual for that purpose.

Many of these questions are becoming daily of rarer

(a) See *Rancliffe v. Parkyns*, 6 Dow. 149. It seems now settled, that where a testator entitled to an undivided share of property devises it in terms importing a gift of the entirety, a case of election is raised against another part-owner taking a benefit under the will; *Padbury v. Clarke*, 2 Macn. & Gor. 298; *Fitzsimons v. Fitzsimons*, 28 Beavan, 417.

(b) 21 Beavan, 447; affirmed on appeal, 8 De Gex, Macn. & Gor. 641; and see also *Usticke v. Peters*, 4 Kay & Johnson, 437.

occurrence owing to recent alterations in the law, but they are still of considerable practical importance :—

1. And first, under the law as existing previously to Lord Langdale's Act (*a*), a testator occasionally made a will sufficiently executed to pass his personal estate but insufficiently so to pass real estate. A question then arose whether an heir to whom a legacy had been bequeathed by the will might take his legacy, and also real estate which, being ineffectually devised by the will, had descended to him as heir. It was held, that he might. The ground taken seems to have been that the will being ineffectual as to real estate, the devises of real estate therein contained must be treated as having been blotted out.

This result appears to have been viewed by eminent judges as far from satisfactory. The chief objection lay in the circumstance that it was clearly established that a testator might, by an unattested will, bequeath personal estate, and annex to this bequest an express condition that the legatee should not take unless he gave up real estate to some one else. Thus the testator might say, "I bequeath 1000*l.* to A" (A being his heir at law), "provided he makes over Whiteacre to B, and if not, I give the 1000*l.* to B"; and in this case A, the heir, could claim the 1000*l.* only upon giving up Whiteacre (*b*). It was therefore argued that, in a case where a testator merely bequeathed 1000*l.* to

(*a*) 1 Vict. c. 26.

(*b*) See Boughton v. Boughton, 2 Vesey, sen., 12, a less favourable case for Election, as the decision merely rested on a general clause that any one disputing the will should forfeit all claim.

his heir A, without, as in the case last supposed, annexing any express condition, and Whiteacre to B, the whole will might well be read for the purpose of annexing to the gift of 1000*l.*, a *tacit* condition, similar to the express one which would have been of undoubted validity. It is difficult to resist the force of this argument. One might perhaps not have been surprised had the Court decided that an express condition of the kind mentioned was altogether invalid as a mere scheme to enable the testator substantially to devise the land by an unattested will, but it is difficult to understand how the Courts, after upholding an express condition of the sort, should have hesitated to apply the doctrine of election. Lord Eldon in a leading case (*a*), makes the following observations on the subject:—

“ The next consideration is, whether, if real estate,
 “ this is not a case of election against the heir. If I
 “ was at liberty to read the codicil as an instrument
 “ capable of disposing of real estate, there could be no
 “ doubt his real meaning was to give the whole property
 “ by these two last instruments. I have looked at my
 “ own note of *Carey v. Askew*, and Mr. Romilly’s
 “ account of it is very correct.

“ * * * * * Lord Kenyon
 “ said, the distinction was settled, and was not to
 “ be unsettled, that if a pecuniary legacy was be-
 “ queathed by an unattested will, under an express
 “ condition to give up a real estate by that unat-
 “ tested will attempted to be disposed of, such a con-

(a) *Sheddon v. Goodrich*, 8 Vesey, 481 ; see page 496.

“dition being expressed in the body of the will, it was
“a case of election; as he could not take the legacy
“without complying with the express condition. But
“Lord Kenyon also took it to be settled, as Lord
“Hardwicke had adjudged, that, if there was nothing
“in the will but a mere devise of real estate, the will
“was ‘not capable of being read as to that part; and
“unless, according to an express condition, the legacy
“was given so that the testator said expressly, the
“legatee should not take unless that condition was
“complied with, it was not a case of election. The
“reason of that distinction, if it was *res integra*, is
“questionable.”

2. I pass on to a class of decisions which affords an additional testimony to the unsoundness of the principle under which the heir of freehold property was exempted from obligation to elect. I mean those respecting copyholds.

You may remember that, previously to the Act 55 Geo. III. c. 192 (commonly referred to as Mr. Preston’s Act), devised copyholds could only pass where they had been previously surrendered to the use of the owner’s will. Hence, where a testator professed to devise unsurrendered copyhold property, which therefore for want of a surrender descended to the heir, a question arose whether the copyhold heir could claim both a legacy under the will, and also the copyhold property. It might have been supposed that the will being inoperative altogether as to copyholds, the customary heir would have stood in the same position as the heir of freehold property, professed to be de-

vised by an unattested will. It was held, however, contrary to the analogy suggested by the decisions in regard to wills of freehold property, that the heir was put to his election (a).

3. I turn now to a third class of cases ; those in which a testator owning Scotch property makes a will professing to devise that property, but inoperative according to Scotch law, and by the same will gives benefits to the Scotch heir. In this case is the latter bound to elect ? This was the point for decision in the case of *Brodie v. Barry* (b), where the testator devised to trustees all his freehold, leasehold, copyhold, and other estates, whatever and wheresoever situate, in England, *Scotland*, and elsewhere, upon certain trusts. The will not possessing the solemnities required by the law of Scotland for passing real estate locally situated there, the question was, whether the Scotch heirs, who took interests under the will, could be put to their election. The introductory observations of Sir W. Grant, point out so happily the difficulty of reconciling with sound principles the decisions upon the cases in reference to freeholds and copyholds just adverted to, that I cannot forbear reading them :—

“ If it were now necessary to discuss the principles
 “ upon which the doctrine of election depends, it
 “ might be difficult to reconcile to those principles, or
 “ to each other, some of the decisions, which have taken
 “ place on this subject. I do not understand, why a

(a) See *Highway v. Banner*, 1 Brown's C.C. 584; *Rumbold v. Rumbold*, 3 Vesey, 65.

(b) 2 Vesey & Beames, 127.

“ will, though not executed so as to pass real estate
 “ should not be read for the purpose of discovering in it
 “ an implied condition concerning real estate, annexed
 “ to a gift of personal property ; as it is admitted it must
 “ be read, when such a condition is expressly annexed
 “ to such gift. For if by a sound construction such
 “ condition is rightly inferred from the whole instru-
 “ ment, the effect seems to be the same, as if it were ex-
 “ pressed in words. And then, if it be rightly decided,
 “ that a will defectively executed is not to be read
 “ against the freehold heir, I have been sometimes in-
 “ clined to doubt, whether any will ought to be read
 “ against the copyhold heir ; a will, however executed,
 “ being as inoperative for the conveyance of copyhold
 “ estate, as a will defectively executed is for the con-
 “ veyance of freehold estate.”

Further on in his judgment, Sir W. Grant, after discussing the question which arose whether the case was to be governed by the English or the Scotch law, held that if the English law was to govern his decision, the case must be treated as analogous to that of a devise of unsurrendered copyholds (and the result upon the Scotch law being the same for other grounds) that the heir must elect (*a*).

Before parting altogether with the decisions on Copyholds and Scotch property, I may observe, that you will

(*a*) And recently V.-C. Stuart, in the case of a will insufficiently executed to pass estates in the island of St. Kitt's, held that the colonial heir must be regarded as standing in the same position as (not an heir of an English freehold but) an heir of unsurrendered copyholds or of Scotch estates. *Dewar v. Maitland*, L. R. 2 Eq. 834.

find amongst them cases affording an additional instance of the application of the general canon already noticed—viz., that the intention to dispose by the will of the property which is claimed adversely to the will, must clearly appear. I mean the cases deciding that a general devise by the testator of all his lands, *whatsoever and wheresoever*, does not afford a sufficient indication of intention to pass copyholds or Scotch property to raise a case of election. You must for that purpose find in the will an express reference either to copyhold or to Scotch property, as the case may be (a).

The best cases which you can consult as showing the inefficacy of a general devise for the purpose of raising a case of election are, as to Copyholds, *Judd v. Pratt* (b); and as to Scotch property, *Maxwell v. Maxwell* (c).

The principle of the decisions is perhaps best expressed in the following words of Sir John Leach in the case of *Johnson v. Telford* (d), in which case, as in *Maxwell v. Maxwell*, there was no express reference to Scotch property. Sir J. Leach says:—"In the case of *Brodie v. Barry* the Scotch estate was mentioned in the will and expressly intended by the testator to pass thereby. In *this will* no notice whatever is taken of the Scotch estate, and the question is,

(a) Thus, in *Brodie v. Barry*, in which the doctrine of election was held to apply, the devise was of all the estates, "freehold, leasehold, copyhold, and other estates whatever, and wheresoever situate, in England, Scotland, and elsewhere."

(b) 13 Vesey, 168; 15 Vesey, 390.

(c) 16 Beavan, 106; 2 De Gex, Macn. & Gor. 705.

(d) 1 Russell & Mylne, 248.

“ whether it is clearly to be collected from the general words used, that the testator meant to pass his Scotch estate to the uses of his will. *Where a testator uses only general words it is to be intended he means those general words to be applied to such property as will in its nature pass by his will.*”

The same doctrine is more elaborately expounded by Knight Bruce, L. J., in giving judgment in the appeal in *Maxwell v. Maxwell* (a), in which case the devise was by a will, inoperative as to Scotch heritable property, of all the testator's “ real and personal estate whatsoever and *wheresoever*” (b). His Lordship there expresses himself as follows :—

“ It is said on the part of the other children, and denied on his part, that he must either give up the Scotch property for the purposes of the will, or take nothing under the will; the claim of the younger children being founded on the generality, the universality, of the language of gift contained in it. Nor can he gainsay that the Scotch property was part of the testator's estate, or that the will purports to give all his real and personal estate whatsoever and wheresoever. I apprehend, however, that according to the principles or rules of construction which the English

(a) 2 De Gex, Macn. & Gor. 705; see p. 713.

(b) In *Orrell v. Orrell*, L. R. 6 Ch. App. 302, where the words used by the testator were: “ All the residue of my real estate situate *in any part of the United Kingdom* or elsewhere;” and where the testator left estates in England and Scotland, but none in Wales or Ireland, it was held by the Lords Justices (James & Mellish), on appeal from the Duchy Court of Lancaster, that a case of election was sufficiently raised against the Scotch heir.

“law applies,—if not to all instruments, at least to
 “testamentary instruments liable to interpretation, as
 “the will in question is,—according to its principles
 “and rules, the generality, the mere universality, of
 “a gift of property, is not sufficient to demonstrate or
 “create a ground of inference that the giver meant it
 “to extend to property incapable, though his own, of
 “being given by the particular act. If he has speci-
 “fically mentioned property not capable of being so
 “given, the case is not the same: as here, if the
 “testator had mentioned *Scotland* in terms, or had
 “not had any other real estate than real estate in
 “*Scotland*, there might have been ground for putting
 “the heir to his election.”

There is, however, one class of cases in which, under the law as applicable to wills executed previously to Lord Langdale's Act, the doctrine of election is called into operation by mere general words. I mean where a testator, professing to do what the then state of the law did not enable him to do, affected to devise all the lands of which he might be seised at the date of his death. In this case the heir, if he took any benefit under the will, was bound by the doctrine of election to give effect to the attempted disposition of any after-acquired real estate. You may refer on this point to the recent case of *Schroder v. Schroder*, before Vice-Chancellor Wood (a), affirmed by Lord-Chancellor Cranworth on appeal (b).

Of course you will bear in mind that now, under

(a) 1 Kay, 578.

(b) 18 Jurist, 987; 24 Law Journal Rep. (N.S.) Chanc. 513.

Lord Langdale's Act (*a*), a will is to be construed, with reference to the property therein comprised, to speak and take effect as if executed at the date of the testator's death, and there can therefore no longer be any room for the operation of this species of election, except as to wills executed previously to that Act.

(III.) My time permits but a few short observations on the third main division of my lecture, viz., the application of the doctrine of election to persons under disability.

I will take separately the cases of married women and of infants.

Upon this question, as indeed upon almost all others bearing upon the doctrine of election, Mr. Swanston's notes are still our most valuable repertory; and, in this instance, the particular note applicable is also appended to the report of *Gretton v. Haward* (*b*).

As to Married Women.—You will perceive on reading the note referred to, that a somewhat fluctuating practice has prevailed in cases where married women were bound to elect. More commonly it seems to have been assumed that the married woman was competent to elect, though occasionally a reference has been directed to inquire in which way it would be most for the benefit of the *feme covert* to elect.

On the other hand, Vice-Chancellor Wood, in the recent case of *Barrow v. Barrow* (*c*), lays down in

(*a*) 1 Vict. cap. 26, sect. 24.

(*b*) See 1 Swanston, p. 413.

(*c*) 4 Kay & Johnson, 409; see page 419.

the strongest terms that a married woman is competent to elect. The Vice-Chancellor thus expresses himself:—

“A married woman can elect so as to affect her interest in real property without a deed acknowledged for that purpose. And where she has not already elected, the Court can order her to signify her election. It was said, that a married woman could not elect so as to bind her real estate; but *Ardesoife v. Bennet* shows the contrary; and that case was followed by others referred to in Mr. Swanston’s note to *Gretton v. Haward*, which establish that she can elect so as to affect her interest in real property; and that, where she has once so elected, though without deed acknowledged, the Court can order a conveyance accordingly; the ground of such order being, that no married woman shall avail herself of fraud. Having elected, she is bound, and the transaction will be enforced against the heir.”

It may, I think, therefore be assumed that *prima facie* a married woman is competent to elect, and that when she is willing to elect for herself the Court will allow her to do so, unless indeed her husband has an interest in the question and differs in opinion from the wife, in which case considerable difficulty exists (a).

(a) See *Wall v. Wall*, 15 Simons, 513, 521. In *Griggs v. Gibson*, L. R. 1 Eq. 685, where an annuity was given by will to a married woman on the express condition of her relinquishing a previous provision made for her by settlement, which condition she was unable to comply with to the full extent in consequence of her husband having acquired a life interest in the settled real estate, and of such life interest having passed to his assignee in insolvency, the Court allowed the married woman to elect

In one particular instance, however, it is distinctly established that a married woman cannot elect, viz., where after marriage a fortune is settled upon her in lieu of dower (a). But this rests upon the particular words of the 9th section of the Statute of Uses (b), which expressly enacts that a jointure made to the wife *after marriage* may be refused by her after the death of her husband.

As regards Infants, the case seems to stand somewhat differently. The incompetency of infants to elect, and the right of the Court to elect for them, has been almost uniformly assumed by the practice of the Court, though in one instance, *Rushout v. Rushout* (c), a decree appears to have been made that a female infant should make her election at eighteen.

Occasionally, when it has been practicable to do so, without prejudice to the rights of other parties, the Court has deferred the question of election until the infant should be of age. This was done in the leading case of *Streatfield v. Streatfield* (d).

As regards lunatics, these clearly cannot elect, and the correct course must, I conceive, be a reference to inquire what is most for their benefit.

to take the annuity and to relinquish what she could relinquish, on the terms of compensation being made out of her annuity in respect of the unrelinquished life estate.

(a) See *Frank v. Frank*, 3 Mylne & Craig, 171. And there can be no election by a married woman, even with the sanction of the Court, to give up property to which a restraint on anticipation is annexed; *Robinson v. Wheelwright*, 21 Beavan, 214; 6 De Gex, Macn. & Gor. 535.

(b) 27 Hen. VIII. c. 10.

(c) 6 Brown's Parliamentary Cases, 89.

(d) *Cases tempore Talbot*, p. 176.

It is hardly necessary for me to say that, though now concluding, I leave still a considerable number of important questions connected with this doctrine wholly untouched: amongst others, the right of the party before making election to be fully in possession of the facts necessary to enable him to form an accurate estimate of his position (*a*); the question, what acts will be held to amount to an election (*b*); the application of the doctrine to the cases arising under the execution of powers (*c*); and the question whether evidence *dehors* the will may be resorted to for the purpose of raising a case of election (*d*). You must endeavour not merely to fill in the outlines which I have traced, but to make the requisite additions to the foregoing imperfect sketch.

(*a*) See *Dillon v. Parker*, 1 Swanston, 359. · *Douglas v. Douglas*, L. R. 12 Eq. 617, at pages 637—8.

(*b*) See *Worthington v. Wiginton*, 20 Beavan, 67.

(*c*) Sugden on Powers, chap. 11, sect. v. (8th edit.).

(*d*) *Ibidem*, p. 587 (8th edit.); Wigram on Wills, 39.

SATISFACTION AND PERFORMANCE.

THE doctrine of satisfaction may be said to arise generally under one of the two following states of circumstances :—

First.—When a father, or person filling the place of a parent, makes a double provision for a child, or person standing towards him in a filial relation.

Secondly.—When a debtor confers, by will or otherwise, a pecuniary benefit on his creditor.

Taking these main divisions in the order stated, and assuming in the first instance, for the sake of simplicity, the case to be one of *father and child*, the first point to be noticed is, that these double provisions for children may occur in the two following ways :—

(a.) Either the father first gives to his child by will a legacy, and then on some other occasion—more commonly on the marriage of that child—makes a pecuniary provision for it ; or,

(β.) The father, on the occasion of marriage or on some other occasion, agrees to make a provision for a child, and subsequently makes a bequest to that child by will.

In each of these cases the general rule of the Court

is, that the benefits given to the child by the second instrument, settlement or will, as the case may be, are to be viewed as a satisfaction (*a*) of the benefits conferred by the first, whether will or settlement. The Court presumes, that what the father does in each case is done in fulfilment of his moral obligation to make a provision for his child; and it considers that he is to be presumed as not intending a double provision, and that the child, therefore, ought not to claim under both instruments.

I shall say but very few words with reference to the question how far this doctrine, now firmly established, can be regarded as resting on sound principle. The difficulties respecting it lie pretty much on the surface.

Where the father first gives a benefit by will, and then another by settlement, why should he not in the settlement have said that the provision thereby made was in satisfaction of that contained in his previous will?

Similarly, where the agreement for a provision comes first by settlement, why should not the subsequent will have expressed the intention of satisfaction?

The doctrine, in truth, assumes inadvertence and oversight on the part of the father, since the argument that the father may be presumed to have known the law, and to have relied upon it, however permissible, now that the doctrine exists *de facto*, is one that could not for a moment be tolerated when deciding whether the doctrine should or should not be established.

Passing by the question of principle with these short

(*a*) See pages 359, 360 *infra*, and note (*a*), p. 360.

remarks, I proceed now to consider more particularly the first class of cases in which the doctrine of satisfaction is called into play,—viz., that of double provisions for children.

Bear in mind, that these cases of double provisions occur commonly, as already pointed out, in two different ways—*i. e.*,

(*a.*) First, a will, and then a settlement.

(*β.*) First, a settlement, and then a will.

Most of the observations I have to make will apply equally to either of these cases. Where there is any marked distinction, I shall endeavour to point it out.

1.—The first general observation is, that in the case of double provisions the doctrine of satisfaction applies only where the parental relation, or its equivalent, exists.

If a person give a legacy to a mere stranger, and then make a settlement on that stranger; or first agree to make a settlement on a stranger, and then bequeath a legacy to him; the stranger is entitled to claim under both instruments.

The foundation of the doctrine in these cases is the parental relation, or its equivalent.

Let me read to you what Lord Eldon says on this point in a case often quoted (*a*) :—

“ Without going through all the cases that were
 “ cited, and those referred to in them, having compared
 “ the case in *Atkyns* with manuscript notes of that case,
 “ and looked into some other cases, one in *Ambler*,
 “ and some earlier, I may state as the unquestionable

(*a*) *Ex parte Pye*, 18 Vesey, 150.

“ doctrine of the Court, that where a parent gives a
 “ legacy to a child, not stating the purpose with refe-
 “ rence to which he gives it, the Court understands
 “ him as giving a portion; and by a sort of artificial
 “ rule, in the application of which legitimate children
 “ have been very harshly treated, upon an artificial
 “ notion that the father is paying a debt of nature, and
 “ a sort of feeling upon what is called a leaning against
 “ double portions, if the father afterwards advances a
 “ portion on the marriage of that child, though of
 “ less amount, it is a satisfaction of the whole, or
 “ in part.”

You note, of course, Lord Eldon’s words, “ in the
 “ application of which legitimate children have been
 “ very harshly treated.”

This refers to the fact that an illegitimate child is in the eye of the law a *stranger*, and that unless other circumstances are found than the bare relation of parentage “ *by nature*,” the illegitimate child is at liberty to claim a double provision.

Lord Eldon, in his judgment in the case just referred to, expresses himself further on this point, as follows :—

“ I recollect that Lord Thurlow in that case, though
 “ the decision did not turn upon it, remarked, that as
 “ the law will not acknowledge the relation of a natural
 “ child, the doctrine of this Court, on whatever prin-
 “ ciple founded, is, that if a portion is given to a child
 “ by will, or a gift, so constituted as to acknowledge
 “ the legal relation, and afterwards an advancement
 “ is made on marriage, that is *primâ facie* an ademp-

“ tion of the whole, or *pro tanto* ; but if the legacy is
 “ given to a person standing in the relation of a natural
 “ child to the testator, and he afterwards gave that
 “ child a sum of money on marriage, the law does not
 “ admit the conclusion *primâ facie* that the testator at
 “ the time of making the will recognized that relation:
 “ the natural child, therefore, is in so much better a
 “ situation, that in his case the advancement is not
 “ *primâ facie* an ademption, as it is in the case of a
 “ legitimate child ; the effect of which is, that the
 “ presumption is to be formed consistently with the
 “ notion that the testator has less affection for his
 “ legitimate child than even for a stranger, as Lord
 “ Thurlow used to express it.”

In the case actually before Lord Eldon, the testator had in fact described the child in question, though in truth his own illegitimate child, as the child of another person, but that circumstance, though material in reference to a point presently to be mentioned, in no way detracts from the authority of the decision, as showing that, in the absence of other circumstances tending to a different conclusion, illegitimate children are to be viewed as mere strangers.

2.—The next general proposition to which I would invite your attention is this, that although the doctrine of satisfaction does not, as a general rule, apply where the beneficiary is a stranger, it may and does apply where the donor has placed himself “ *in loco parentis*,” as the phrase is, towards the beneficiary. It was in reference to this point that the mode in which the testator had, in the case before Lord Eldon, described

his own illegitimate child, became material, as showing that he had not assumed the parental character.

But the point demands a closer examination. What is putting one's-self "*in loco parentis*" towards a person for the purposes of this doctrine? Is it necessary that the beneficiary should have been adopted, so to speak, by the donor; should have been received into his household? Must a *quasi* parental relation have been established *in all respects*?

For answers to these questions, I will carry you to the case of *Powys v. Mansfield* (a), admittedly the leading authority on the point, what is putting one's-self "*in loco parentis*"?

There the question arose, whether Sir John Barington, who had by his will given 10,000*l.* to one of his nieces, and had afterwards settled 10,000*l.* upon her marriage, stood "*in loco parentis*" to the niece, so as to give rise to the application of the doctrine of satisfaction. The niece was one of the daughters of Sir John's brother, Fitzwilliam, and the general relations subsisting between the uncle and nieces are thus stated in the report of the case upon the hearing before the Vice-Chancellor of England (b).

"The witnesses deposed, as to the first point, as follows:—That Sir Fitzwilliam, in compliance with the wishes of Sir John, resided near Sir John in the Isle of Wight, and maintained a more expensive establishment than his income (which did not exceed 400*l.* a year) would allow of; that Sir John and his brother lived on the most affectionate terms with

(a) 3 Mylne & Craig, 359.

(b) 6 Simons, 544.

“ each other ; that, for several years, Sir John gave
“ Sir Fitzwilliam 1,000*l.* a-year ; that he took the
“ greatest interest in his nieces, behaved to them as a
“ father, and always acted towards them as the kindest
“ of parents, not showing more partiality to one than
“ to another ; that he frequently gave them pocket-
“ money and made them other presents, and occa-
“ sionally advanced money to defray the expense of
“ their clothing and education, that he allowed them
“ to use his horses and carriages, and had them
“ frequently to dine with him, and that one or other
“ of them was almost always staying in his house ;
“ that he was consulted as to the appointment of their
“ masters and governesses, and as to the marriages of
“ such of them as were married, and that on the
“ plaintiff’s marriage the terms of the settlement
“ were negotiated between the plaintiff and Sir John,
“ and their respective solicitors, without any interfer-
“ ence on the part of Sir Fitzwilliam ; that Sir John,
“ who gave the instructions for the settlement on the
“ 20th of April, 1817, proposed that the 10,000*l.*
“ should be settled on *all* the children of the mar-
“ riage, but afterwards, on the suggestion of the
“ plaintiff, it was agreed that the 10,000*l.* should be
“ settled on the younger children only, as the eldest
“ son would be entitled to a considerable estate on his
“ father’s side.”

Upon these facts the Vice-Chancellor of England decided that Sir John had not placed himself “ *in loco parentis*,” laying down as a general principle, “ that no
“ person can be held to stand *in loco parentis* to a

“ child whose father is living, and who resides with
“ and is maintained by the father according to his (the
“ father’s) means.”

On appeal Lord Cottenham, in reversing this decision, thus expressed himself:—

“ The authorities leave in some obscurity the ques-
“ tion as to what is to be considered as meant by the
“ expression, universally adopted, of one *in loco pa-*
“ *rentis*. Lord Eldon, however, in *Ex parte Pye*, has
“ given to it a definition which I readily adopt, not
“ only because it proceeds from his high authority,
“ but, because it seems to me to embrace all that is
“ necessary to work out and carry into effect the object
“ and meaning of the rule. Lord Eldon says, it is a
“ person meaning to put himself *in loco parentis* ;
“ in the situation of the person described as the law-
“ ful father of the child ; but this definition must, I
“ conceive, be considered as applicable to those
“ parental offices and duties to which the subject in
“ question has reference—namely, to the office and
“ duty of the parent to make provision for the child.
“ The offices and duties of a parent are infinitely
“ various, some having no connection whatever with
“ making a provision for a child ; and it would be
“ most illogical, from the mere exercise of any of such
“ offices or duties by one not the father, to infer an
“ intention in such person to assume also the duty o
“ providing for the child. The relative situation of
“ the friend and of the father may make this unneces-
“ sary, and the other benefits most essential.

“ Sir William Grant’s definition is, ‘ A person as-

“ ‘suming the parental character, or discharging pa-
“ ‘rental duties,’ which may seem not to differ much
“ from Lord Eldon’s, but it wants that which, to my
“ mind, constitutes the principal value of Lord Eldon’s
“ definition—namely, the referring to the intention,
“ rather than to the act of the party. The Vice-
“ Chancellor says, it must be a person who has so
“ acted towards the child as that he has thereby
“ imposed upon himself a moral obligation to provide
“ for it; and that the designation will not hold, where
“ the child has a father with whom it resides, and by
“ whom it is maintained. This seems to infer that
“ the *locus parentis* assumed by the stranger must
“ have reference to the pecuniary wants of the child;
“ and that Lord Eldon’s definition is to be so under-
“ stood; and so far I agree with it; but I think the
“ other circumstances required are not necessary to
“ work out the principle of the rule, or to effectuate its
“ object. The rule, both as applied to a father and
“ to one *in loco parentis*, is founded upon the presumed
“ intention. A father is supposed to intend to do
“ what he is in duty bound to do, namely, to provide
“ for his child according to his means. So, one who
“ has assumed that part of the office of a father, is
“ supposed to intend to do what he has assumed to
“ himself the office of doing. If the assumption of the
“ character be established, the same inference and
“ presumption must follow. The having so acted
“ towards a child as to raise a moral obligation to
“ provide for it, affords a strong inference in favour of
“ the fact of the assumption of the character; and the

“ child having a father with whom it resides, and by
 “ whom it is maintained, affords some inference against
 “ it; but neither are conclusive.”

Ultimately Lord Cottenham, adopting Lord Eldon's definition, was of opinion, upon the evidence, that Sir John Barrington did mean to put himself “ in
 “ *loco parentis* ” to the children, *so far as related to their future provision.*

3.—The next general proposition which I have to present is the following :—That it is not necessary, in order that the doctrine of satisfaction should apply, that the sums given by the two instruments be equal in amount, nor that they be payable at the same time, nor even that the limitations for the benefit of the issue of the child provided for be precisely the same. Indeed it must be regarded as rendered somewhat doubtful by the later decisions, whether it is even necessary that the two subjects matter should be “ *ejusdem generis* ” (a).

The case of *Lord Durham v. Wharton* (b) affords a good illustration of the proposition above laid down, that difference in the limitations will not prevent the operation of the doctrine. There a father, by will, bequeathed 10,000*l.* to trustees, one half to be paid at the end of three years, and the other half at the end of

(a) As to this, see *Holmes v. Holmes*, 1 Brown's Chancery Cases, 553, where a legacy of 800*l.* to a son was held not satisfied by a subsequent gift of a moiety of stock-in-trade of the value of 1500*l.*; and *Dawson v. Dawson*, L.R. 4 Eq. 504, where a share of residue was held partially adeemed by an annual allowance. See, also, *Ravenscroft v. Jones*, 32 Beavan, 669; *Watson v. Watson*, 33 Beavan, 574.

(b) 5 Simons, 297; 3 Mylne & Keen, 472; 3 Clarke & Finnelly, 146.

six years from his death, with interest in the meanwhile, and declared the trusts to be for his daughter for life, and after her decease, in trust for her children as she should appoint by deed or will, and in default of appointment, for all her children equally; and subsequently, on the marriage of the daughter, agreed to give her 15,000*l.* to be paid to the intended husband, he securing by his settlement, pin-money and a jointure for his wife, and portions for the younger children of the marriage: and it was held, that the 10,000*l.* was satisfied by the sum advanced by the father.

Observe how strong this decision was. By the will the daughter took a life interest: by the settlement a jointure. By the will, *all* the children of the daughter took; by the settlement, portions were provided only for the younger children of the particular marriage. Supposing the daughter to marry a second time, and to have children, the effect of the decision of the House of Lords would be to deprive the children of the second marriage of the benefits given them by the will, upon the mere legal presumption. The principle must, I suppose, be taken to be that in the gift to all the daughter's children, the children were made legatees merely by virtue of their relationship to their mother, and that a gift to a daughter for life, and afterwards to her children, is to be viewed as constituting in the aggregate a portion for the daughter.

The proposition just laid down that differences in the mode of limitation will not prevent the application of the doctrine, applies similarly where the order of

events is, first, a settlement; secondly, a will. This was decided in the case of *Lady Edward Thynne v. Earl and Countess of Glengall* (a).

There a father having, upon the marriage of his daughter, agreed to give her a portion of 100,000*l.*, transferred one-third thereof in stock to the trustees of the marriage settlement, and gave them his bond for transfer of the remainder in like stock upon his death; the latter stock to be held by them in trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards, by his will, gave to two of the trustees, a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, remainder for her children generally, as she should by deed or will appoint. And it was held, that the moiety of the residue given by the will was a satisfaction of the sum of stock secured by the bond, notwithstanding the differences of the trusts; and it being found to be for the benefit of the daughter and her children, if any she should have, to take under the will, she was held bound to elect so to take.

I must observe, however, that the difficulty of applying the doctrine where the settlement precedes the will, and the trusts are dissimilar, is obviously much greater than where the will comes first (b). Where the

(a) 2 House of Lords Cases, 131.

(b) See the observations on this point in the recent case of *Chichester v. Coventry*, L.R. 2 H. L. App. 71; and those of Lord Hatherley (when V.C. Wood) in his subsequent decision of *Dawson v. Dawson*, L.R. 4 Eq. 504, at pp. 512—514.

settlement is first in date, the class entitled under that settlement are *purchasers*, and cannot be deprived of their rights upon any presumed intention of the testator. At the utmost they can only be put to their election (a). In the case now open before me, this part of the question was relieved from difficulty, because the residue under the will was so large, that, upon a reference to the Master, he reported it would be for the benefit of the children of the marriage, to take under the will in preference to the settlement. Had he reported otherwise, it is not easy to see how the children of Lady Edward Thynne of a second marriage could legitimately have been deprived of what was intended for them by the will, nor how the equities would have been adjusted (b).

I may add, that this case of *Thynne v. Glengall* is to be noted as having first established that it is not even necessary that the benefit conferred by the second instrument (in that case it was a moiety of the residue of the testator's estate) should be of any distinct or

(a) See the observations of Lord Romilly on this point, *Chichester v. Coventry*, L. R. 2 H. L. App. 71, p. 90.

(b) In *Chichester v. Coventry*, on the original hearing before Lord Hatherley, then V.C. Wood (see *Coventry v. Chichester*, 2 Hemming & Miller, 149, at p. 159, reported on the appeal to the Lords Justices, 2 De Gex, Jones, & Smith, 336), the Vice-Chancellor appears to have been struck by the circumstance that the doctrine of election was applied by the House of Lords in derogation of the previously acquired rights of Lord Edward Thynne under the settlement which made him a joint donee with his wife of the power of appointment amongst children. That the previously acquired rights of the wife and issue under a marriage settlement cannot be satisfied by a subsequent testamentary gift by the covenantor to the husband (his son) absolutely is established by *McCarogher v. Whieldon*, L.R. 3 Eq. 236.

definite sum. I must warn you, however, that, so far as I am aware, it has never yet been distinctly decided that where a father first by will gives a share of residue, and then settles a definite sum, the doctrine of satisfaction applies (a).

4.—The next question is, as to the operation of the doctrine where the sum given by the second instrument is less than that given by the first. Does the smaller sum operate as a complete satisfaction of the larger? A moment's consideration will show you that this question can only arise when the order of events is, first *will*, and then *settlement*; since where the settlement precedes, the right is a right conferred by positive contract, and no subsequent will or voluntary gift can diminish that right. It was, however, long considered that in cases where a father first made a provision for a child by *will*, and subsequently, on the occasion of that child's marriage, made a smaller provision by *deed*, the later provision wholly satisfied the earlier. Lord Eldon's views of the law on the subject, together with his doubts as to the soundness of the result, are thus characteristically expressed in the case of *Ex parte Pye*, so frequently referred to already. He says, in speaking of the doctrine:—

“And in some cases it has gone a length, consistent
“with the principle, but showing the fallacy of much
“of the reasoning, that the portion, though much less

(a) It was so decided shortly after the delivery of the Lectures, in *Montefiore v. Guedalla*, 1 De Gex, Fisher, & Jones, 93, in connection with which case the student may with advantage read the more recent one of *Meinertzhagen v. Walters*, L.R. 7 Ch. App., 670.

“ than the legacy, has been held a satisfaction in some
“ instances ; upon this ground, that the father, owing
“ what is called a debt of nature, is the judge of that
“ provision by which he means to satisfy it ; and
“ though at the time of making the will he thought
“ he could not discharge that debt with less than
“ 10,000*l.*, yet by a change of his circumstances
“ and of his sentiments upon that moral obligation,
“ it may be satisfied by the advance of a portion of
“ 5,000*l.*”

Observe those remarkable words, “ consistent with
“ the principle, but showing the fallacy of much of
“ the reasoning.” There is, I think, no doubt that if
the assumed groundwork of the doctrine had been
maintained in its integrity, it would have been impos-
sible to escape the conclusion that the smaller was to
satisfy the larger. Lord Cottenham, however, in his
first Chancellorship, revolting from the logical conse-
quences of the doctrine, decided, in the well known
case of *Pym v. Lockyer* (a), contrary to the generally
received opinion of the profession, that advancements
subsequent to a will were to be satisfactions *pro tanto*
only.

The judgement in which Lord Cottenham thus
broke through the trammels of the doctrine, or rather,
I should say, of the assumed groundwork of the doc-
trine, is so interesting that I cannot forbear quoting
from it at some length. Lord Cottenham says :—

“ When, upon the first argument of this case, I had
“ come to the conclusion that the testator had placed

(a) 5 Mylne & Craig, 29.

“ himself *in loco parentis*, and that the effect of the
“ portions upon the provisions by the will was, there-
“ fore, to be the same as if the testator had been the
“ father of the children, I was startled at the con-
“ sequences of such a decision, if the rule generally
“ received in the profession, and laid down in all the
“ text-books of authority, and apparently founded
“ upon the highest authority, was to regulate the divi-
“ sion of the property; the rule to which I refer being,
“ that a portion *advanced by a father to a child will be*
“ *a complete ademption of a legacy, though less than the*
“ *testamentary portion.* I could not but feel that, in
“ the case before me, and in every other, the effect
“ of the rule would be to defeat the intention of the
“ parent. A father who makes his will dividing his
“ property amongst his children, must be supposed to
“ have decided what, under the then existing circum-
“ stances ought to be the portion of each child, not
“ with reference to the wants of each, but attributing
“ to each the share of the whole which, with reference
“ to the wants of all, each ought to possess. If sub-
“ sequently, upon the marriage of any one of them, it
“ becomes necessary or expedient to advance a portion
“ for such child, what reason is there for assuming
“ that the apportionment between all ought, therefore,
“ to be disturbed? . . . The supplying the wants of
“ one child for an advancement is not permitted to
“ lessen or destroy the provisions made for the others,
“ by giving both provisions to the child advanced; but
“ the supposed rule that the larger legacy is to be
“ adeemed by the smaller provision, appears to me not

“ to be founded on good sense, and not to be adapted
“ to the ordinary transactions of mankind, and to be
“ subversive of the obvious intention of the parent.
“ Can it be assumed, as a proposition so general as
“ to be the foundation of a rule of property, in the
“ absence of any expressed intention, that the mar-
“ riage of one child and the advancing a portion to
“ such child, furnishes ground for the father’s altering
“ the mode of distributing his property amongst his
“ children, by taking from the portion previously des-
“ tined for that child, and, to the same extent, adding
“ to the provision for the others? Is it not, on the
“ contrary, the usual course and practice that the
“ father, upon a child’s marriage, parts with the con-
“ trol over as little as possible, preferring to reserve to
“ himself the power of disposing of the residue of the
“ portion destined for such child, as its future circum-
“ stances and situation may require? In doing so,
“ the father is not influenced only by the natural pre-
“ ference of bounty to obligation, but adopts a course
“ which he may well be supposed to think most bene-
“ ficial for his children. Where, then, is the ground
“ of the presumption, that he intended, by advancing
“ part of what he had destined as the portion of that
“ child, to deprive that child of the remainder?

“ The argument in favour of the proposition appears
“ to me to be founded upon technical reasoning as to
“ the term ‘portion,’ without due consideration of the
“ sense in which that term is used. The giving a por-
“ tion to a child is said to be a moral debt, but of the
“ amount of which the parent is the only judge; and,

“ although the parent has, by his will, adjudged the
“ amount of that moral debt to be a certain sum, he
“ is supposed, by the settlement, to have departed
“ from that judgement, and to have substituted the
“ amount settled : and this only because the one pro-
“ vision and the other are considered as a portion.
“ This, however, assumes the portion settled to be
“ intended as a substitution of the portion given by
“ the will ; and such intention, if proved, would re-
“ move all doubt ; but the question is, whether such
“ intention is to be presumed, in the absence of all
“ proof. Is it not more reasonable to suppose that
“ the intention as to the amount of the portion re-
“ mains the same, and that the sum settled is only an
“ advance of part of what the will declares to have been
“ the intended amount of the whole ? ”

After further observations Lord Cottenham concluded by stating that it appeared to him that all reasoning and all analogy were against the supposed rule ; and after examining the authorities, he arrived at the conclusion that there was not sufficient authority to support the supposed rule, and that, as it was opposed to principle, it was his duty to decline following it, notwithstanding its general previous reception in the legal profession.

5.—Next, as to resorting to “ extrinsic evidence.” It is to be borne in mind that the rule against double portions is a presumption of law, and like other presumptions of law may be rebutted by extrinsic evidence ; *i. e.*, evidence not contained in the written instruments themselves.

This is a general rule of evidence, which applies in many other similar cases (a).

You cannot, it is well known, go into evidence to add to, vary, or explain a written instrument. But in the cases we are now considering, the instruments say nothing as to satisfaction. The satisfaction is presumed by the law, and if it can be shown by evidence *dehors* the written instrument that the presumption is incorrect, it will not be made. It is therefore competent to the party claiming double portions to show that, although the presumption be against him, the donor, in fact, intended him to have double portions; and flowing from this right of the party claiming doubly to go into evidence to rebut the presumption of law, there arises a right on the part of those who oppose his double claim also to go into counter-evidence to support the presumption.

Bear in mind, however, that there is no original right on the part of the person seeking to dispute the double provision to establish, by independent evidence, that a double provision was not intended. Unless the instruments themselves do, in the first instance, raise a presumption against double provisions, the claim to double provision succeeds as of course. The right of the party disputing double provisions is merely a right to meet, by counter evidence, evidence adduced by the other side to rebut the presumption. It is necessary to warn you that the observations of Sir John Leach

(a) *e.g.*, cases as to double legacies, as to executors taking residue beneficially (where the 11 Geo. IV. & 1 Will. IV. cap. 40, does not apply), &c.

on this point in *Weall v. Rice* (a), cannot safely be treated as law (b).

Extrinsic, or rather parol, evidence may, however, occasionally form the whole groundwork of the application of the doctrine. Thus the transaction upon which the alleged satisfaction depends may be altogether unsupported by written evidence. Such was the case in *Kirk v. Eddowes* (c). There a father bequeathed 3000*l.* for the separate use of his daughter for life, with ulterior trusts for her children. Subsequently he gave the daughter and her husband a promissory note for 500*l.*, and Vice-Chancellor Wigram held that it was competent to the parties who alleged that this transaction operated as a satisfaction to go into evidence respecting all the circumstances of the transaction, including the declarations made by the testator at the time of handing over the note.

I may observe, in passing, that you will find in Vice-Chancellor Wigram's judgement in this case some admirable observations, well calculated to remove the doubts which must at some time or other cross the mind of almost every inquiring student in reference to this doctrine of satisfaction. Consider the facts in *Kirk v. Eddowes*. A testator by his will bequeaths a legacy. He then hands over a promissory note. How can the will be thus informally revoked? The answer is, it is not revoked at all. The operation

(a) 2 Russell & Mylne, 263.

(b) See *Hall v. Hill*, 1 Drury & Warren, 94, pp. 129—138; *Palmer v. Newell*, 20 Beavan, 32; *Taylor on Evidence*, 1036 (4th edit.), 1056 (5th edit.).

(c) 3 Hare, 509.

is analogous to that of a common case of ademption, and in truth is commonly described by the same word “ademption” (a).

You know the general operation of ademption. A testator says, “I bequeath my black horse Dobbin.” Dobbin dies. The testator dies. The legacy fails, not because it is revoked, but because there is no subject-matter to satisfy it. It is, to use the technical term, “adeemed,” or “taken away,” for want of subject-matter to answer it. The operation of satisfaction is, if I rightly understand the theory, of a converse kind. The will gives a legacy as a portion. A portion is subsequently provided by act “*inter vivos*.” The will remains intact, but the legatee is not paid his portion, because he has already *had it*. The legacy is adeemed by satisfaction, just as in the other case it is adeemed for want of a subject-matter to operate upon. Hence the Vice-Chancellor’s words in *Kirk v. Eddowes*: —“Ademption of the legacy, and not revocation of “the will, is the consequence for which the defendant “contends. The defendant does not say the will is “revoked; he says the legatee has received his legacy “by anticipation.”

(II.) I pass now to the second main division of the cases relating to satisfaction, viz., those of satisfaction of a debt.

And here at the outset let me warn you that while

(a) See the observations of Lord Romilly in *Chichester v. Coventry*, L. R. 2 H. L. App. 71, at pp. 90, 91, in which his Lordship treats the expression “satisfaction” as properly applicable only where the settlement comes first and the will subsequently.

using the word "*debt*," I mean to exclude from its signification any obligation which, though in the nature of a debt, yet falls also within the description of a provision for a child. Thus in every one case of double portions just treated of where the order of events is first settlement—and then will—the settlement is in fact a "*debt*"; for I need hardly say that where a father actually *transfers* by way of settlement for a child, say 10,000*l.* stock, and then by subsequent will leaves (say) 10,000*l.* or 15,000*l.* to the same child, no case of satisfaction can arise. The gift by settlement has been made outright, and that by will comes as an additional gift. It is only where the settlement exists in the form of liability or debt, that a gift by subsequent will can be deemed a satisfaction. Such was the case of *Thynne v. Earl of Glengall*, just now referred to. That very case affords, indeed, one of the best general statements that I can refer you to respecting the peculiarities of the doctrine of satisfaction of debts by legacies as distinguished from that of satisfaction of portions—a statement which in its very terms assumes that a settlement agreed to be made by a father, though in one sense a *debt*, (*a*) stands on

(*a*) According to the recent decision in *Chichester v. Coventry*, L.R. 2 H. L. App. 71, the doctrine of satisfaction does not so completely alter the legal aspect of a covenant by way of settlement on a child as to prevent a subsequent direction in a will for payment of debts from applying to the covenant. In that case there was first a covenant for payment of 10,000*l.* to the trustees of a daughter's settlement, and subsequently a will directing payment of debts, and giving a moiety of the residue upon trusts for the daughter and her issue, and the direction to pay debts was relied on as a material circumstance for excluding the operation of the doctrine of satisfaction. Upon the decision Lord Hatherley has observed:—"I think after

an entirely different footing as respects the doctrine of satisfaction. Lord Cottenham, moving the judgement of the House, expressed himself thus :—

“ Before I consider the authorities as applicable to
“ the facts of this case I think it expedient to throw
“ out of consideration all the cases which have been
“ cited, in which questions have arisen as to legacies
“ being or not being held to be in satisfaction of debt ;
“ for, however similar the two cases may at first sight
“ appear to be, the rules of equity as applicable to
“ each are absolutely opposed the one to the other.
“ Equity leans against legacies being taken in satisfac-
“ tion of debt, but leans in favour of a provision by
“ will being in satisfaction of a portion by contract,
“ feeling the great improbability of a parent intending
“ a double portion for one child, to the prejudice
“ generally, as in the present case, of other children.
“ In the case of debt, therefore, small circumstances
“ of difference between the debt and the legacy are
“ held to negative any presumption of satisfaction ;
“ whereas in the case of portions, small circumstances
“ are disregarded. So in the case of debt, a smaller
“ legacy is not held to be a satisfaction of part of a
“ larger debt ; but in the case of portions it may be
“ satisfaction *pro tanto*. It has been decided that in
“ the case of a debt, a gift of the whole or part of the

“ that case it will be exceedingly difficult to hold that any subsequent
“ provision by will after a covenant or engagement by bond in a previous
“ instrument will be a satisfaction of the debt contained in the previous
“ instrument, because there are so very few wills in which there is
“ not a direction to pay debts, that the case of course would seldom
“ happen.” (See *Dawson v. Dawson*, L.R. 4 Eq. 513.)

“residue cannot be considered as satisfaction, because
 “it is said that, the amount being uncertain, it may
 “prove to be less than the debt.”

This statement embodies to a great extent the leading peculiarities of the doctrine of satisfaction of debts by legacies.

(a.)—The leaning is against satisfaction instead of being in favour of it, as in the case of portions.

(β.)—Small circumstances of difference are sufficient to repel the presumption: as where the legacy is of less amount than the debt (*à fortiori* of course if the thing be not “*ejusdem generis*,” as land or specific chattels), or even where the amount is merely uncertain, as the gift of a residue, in both of which cases satisfaction takes place in regard to portions (a).

In reference to these cases of satisfaction of debt by a legacy, Sir Thomas Clarke in delivering judgment in *Mathews v. Mathews* (b), mentions a remarkable instance of the inclination of the Court to lay hold of any small circumstance for the purpose of evading the

(a) So, although where a portion is given to a child by will, and a subsequent provision is made for the same child by an instrument creating a debt, a direction in the will to pay debts and legacies is not sufficient to rebut the ordinary presumption of satisfaction (see *Trimmer v. Bayne*, 7 Vesey, 508; *Dawson v. Dawson*, L. R. 4 Eq. 504), and although, notwithstanding the observations of Lord Hatherley in *Dawson v. Dawson* (see note (a) at page 361, *supra*), it may be doubted whether a simple direction to pay debts will, standing alone, be sufficient to prevent the presumption in the case of a settlement on a child by way of covenant followed by a will containing the direction, it must be considered settled that in cases not falling within the doctrines applicable to double portions a direction to pay debts will *per se* be sufficient to exclude satisfaction (see *Cole v. Willard*, 25 Beav. 568; *Pinchin v. Simms*, 30 Beav. 119).

(b) 2 Vesey, sen., 636.

application of the doctrine. He says:—" I remember
" a case before the Lord Chancellor where an old lady,
" indebted to a servant for wages, by will gave ten
" times as much as she owed or was likely to owe;
" yet because made payable in a month after her own
" death, so that the servant might not outlive the
" month, although great odds the other way, the Court
" laid hold of that."

This illustration shows that the legacy to be a satisfaction must be certainly payable. Any contingency, however remote, will prevent satisfaction.

Time does not permit me to dwell longer on the various circumstances which have been held sufficient to repel the presumption of satisfaction of a debt. I deem it of more importance to attempt to convey a clear notion of the position of this branch of my subject in reference to questions strictly of ordinary debts arising between parent and child.

I have already pointed out that a debt in the shape of a covenant to settle falls within the head of law applicable to double portions. On the other hand, where a father owes a child a mere debt, as where father and son are in partnership, and a debt is due from the former to the latter on the result of partnership transactions, a legacy to the son, who is a creditor, must be governed by the same principles in respect to satisfaction, as if the son were a perfect stranger in blood.

So where a father owed his daughter 200*l.* as executor of the will of a third person, and then gave her 500*l.* by his own will to be paid to her at the age of 21 years

if she should arrive to that age but not otherwise, it was held she might claim both the 200*l.* owing by her father, and the provision made by the father's own will (*a*).

On the other hand, it has been decided that, where the father being a debtor to the child in his lifetime, makes an advancement to the child upon marriage, or some other occasion, that advancement will presumably be a satisfaction. And the case is the same, even though the money be advanced on the occasion of a daughter's marriage, in consideration of a settlement made on the part of the intended husband; and even though the intended husband be ignorant of the daughter's rights, as creditor against her father.

I must confess I find it impossible to reconcile these decisions with sound principle. In order to justify them it seems necessary to disregard the circumstance that full knowledge on the part of the husband might have led to entirely different arrangements. A man about to marry a lady of full age, entitled to say 10,000*l.* owing to her by her father, that father being at the same time willing to give an additional 5000*l.*, stands in a very different position in respect to negotiation from one who supposes the father to be settling 15,000*l.* of his own free bounty. I should have thought the grounds for not implying satisfaction infinitely stronger in a case of this kind, than in one of a gift by will like that just referred to. However, if you want to see the decisions on this point ably reviewed,

(*a*) *Tolson v. Collins*, 4 Vesey, 482; and see *Stocken v. Stocker*, 4 Simons, 152.

let me recommend you to turn to *Plunkett v. Lewis* (a), where, in the judgement of Sir James Wigram, you will find all that can be said.

Meanwhile it is sufficient for me to impress upon you, as being decided law, that while a legacy by will does not, (except when it would do so as between strangers) an advancement by the parent by settlement does, operate as a satisfaction of a simple debt owing by the parent to the child.

I pass now to the second subject mentioned in the prospectus of my lecture for this evening, viz.: "*Performance.*"

Cases of performance are divided by a very narrow line from those of satisfaction.

The ordinary mode of distinguishing satisfaction from performance is by saying that satisfaction implies the substitution or gift of something different from the thing agreed to be given, but equivalent to it in the eye of the law, while in cases of performance the thing agreed to be done is in truth wholly or in part performed.

The two principal classes of cases in respect to performance are commonly illustrated by *Wilcocks v. Wilcocks* (b), *Blandy v. Widmore* (c).

Wilcocks v. Wilcocks was the case of a covenant by a man on marriage to purchase lands of 200*l.* a year, and settle them for the fortune of his wife, and to the

(a) 3 Hare, 316.

(b) 2 Vernon, 558.

(c) 1 Peere Williams, 324; see also this and the last preceding case, White & Tudor's Leading Cases, vol. ii., pp. 376, 378 (3rd edit.).

first and other sons of the marriage in tail. He purchased lands of that value, and took a conveyance to himself in fee, making no settlement. At his death, his heir, who was also entitled under the settlement as first son, claimed the purchased lands as heir, and also to have the covenant performed by laying out an adequate portion of the personalty in the purchase of land. It was held, that the lands descended were to be deemed a satisfaction of the covenant.

In *Blandy v. Widmore*, a man before marriage covenanted to leave his intended wife 620*l*. He died intestate, and the wife's share under the Statute of Distributions exceeded 620*l*. This was held a performance.

The two classes of cases are then these :—

(1.) Covenant to purchase and settle land, and a purchase made without an express settlement.

(2.) Covenant to leave property, and the receipt of a share by the covenantee under an intestacy.

In reference to the first class of cases, let me say, that the acts done commonly approach much less nearly to “performance” than in the second. Indeed, in *Wilcocks v. Wilcocks*, the word “performance” does not even occur. The phrase used by the Judge in deciding the case, was satisfaction. This class of decisions is perhaps better represented by *Lechmere v. Lechmere*, which was decided by Lord Talbot on appeal from Sir Joseph Jekyll (a).

The facts were as follows : Lord Lechmere, upon his marriage with Lady Elizabeth Howard, daughter

(a) *Cases temp. Talbot*, p. 80.

of the Earl of Carlisle, and in consideration of 6000*l.* portion, covenanted to lay out, within one year after the marriage, the said sum of 6000*l.*, and likewise the farther sum of 24,000*l.*, amounting in the whole to 30,000*l.*, in the purchase of freehold lands in possession; which were to be settled upon Lord Lechmere himself for life, remainder to trustees to preserve contingent remainders, remainder to trustees for five hundred years, for raising portions for the daughters of the marriage, remainder to Lord Lechmere in fee. Lord Lechmere further covenanted until the 30,000*l.* should be laid out to pay interest for the same after the rate of 5*l. per cent.*, unto the persons entitled to the rents and profits of the lands when purchased. Lord Lechmere, after his marriage, purchased several estates in fee simple in possession, but which were never settled according to the covenant, as also several terms and reversions, and subsequently died intestate and without issue, leaving a considerable real estate to descend upon the plaintiff, his nephew and heir-at-law. His widow, Lady Lechmere, took out administration, and the nephew brought his bill against her for an account of Lord Lechmere's personal estate, and to have this covenant carried into execution. The defendant, Lady Lechmere, contended that the lands which descended to the plaintiff must be treated as a satisfaction of the covenant. Sir Joseph Jekyll held them to be no satisfaction (a).

An appeal being brought from that decision, Lord Talbot, in his judgement upon this point, expressed

(a) Lechmere v. Earl of Carlisle, 3 Peere Williams, pp. 224, 227.

himself thus (a) :—" The cases upon satisfaction are
" generally between debtor and creditor ; and the
" heir is no creditor, but only stands in his ancestor's
" place. One rule of satisfaction is, that it depends
" upon the intent of the party ; and that which way
" soever the intent is, that way it must be taken. But
" this is to be understood with some restrictions ; as,
" that the thing intended for a satisfaction be of the
" same kind, or a greater thing in satisfaction of a
" lesser : For, if otherwise, this Court will compel a
" man to be just before he is generous ; and so will
" decree both. But these questions are no way material
" in this case, which turns entirely upon my Lord
" Lechmere's intent at the time of these purchases
" made. Those made before the covenant can never
" have been designed to go in performance of the sub-
" sequent covenant, his intent being clear, that the
" whole sum of 30,000*l.* should be laid out from the
" time of the covenant. Then there are terms, with
" covenants to purchase the fee, but terms are not
" descendible to the heir, and so no satisfaction. The
" like of reversions, especially seeing the lives did not
" fall in during the Lord Lechmere's own life. But as
" to the purchases of lands in fee simple in possession,
" it is to be considered that there was no obligation
" upon the Lord Lechmere to lay out the whole sum at
" one time. Now here are lands in possession, lands of
" inheritance purchased ; which, though not purchased
" with the privity of trustees, yet it was natural for the
" Lord Lechmere to suppose that the trustees would

(a) *Cases temp. Talbot*, 80, at p. 92.

“ not dissent from those purchases, being entirely
“ reasonable; the design of inserting trustees being
“ not to prevent proper but improper purchases: And
“ though they were not purchased within the year, yet
“ nobody suffered by it; and so this circumstance can-
“ not vary the intent of a party in a Court of Equity.
“ The intent was, that as soon as the whole was laid
“ out, it should be settled together; and not to make
“ half a score settlements. In the case of *Wilcox and*
“ *Wilcox*, 2 Vernon, 558, the covenant was not per-
“ fected; nothing done towards it strictly, but some
“ steps taken by the ancestor which seemed to be in-
“ tended that way: And it is as reasonable to suppose
“ these purchases to have been intended to satisfy this
“ covenant in the present case, as it was to suppose it
“ so in that.”

Accordingly, Lord Talbot varied the decree only as to the fee simple lands in possession purchased since the covenant.

You will note with reference to this decision: first, that as to the lands purchased previously to the covenant, it was considered (and one might say necessarily so) that they could not be regarded as purchased in pursuance of the covenant; and secondly, that the purchases of the reversions were considered as not made in performance of the covenant.

In short, in these cases the turning point is, whether the fair implication from the facts be or be not that the lands were purchased in performance of the previous engagement entered into.

Here let me warn you that you may occasionally

find referred to amongst the cases relating to "performance" a class of decisions which relate to an entirely different head of equity. I mean cases depending upon the principle that any party interested in a fund held upon trust, is entitled to follow that fund either into land or into any other subject matter upon which it may, though wrongfully, have been laid out (a). Such was the case of *Trench v. Harrison* (b). There trustees of a settlement had power, with the consent of the husband and wife, to lay out the trust fund in the purchase of (amongst other lands) copyholds of inheritance. The husband obtained the fund and purchased copyholds *for lives*—a description of property not authorised by the settlement; and it was suggested that on that ground, as in *Lechmere v. Lechmere*, the copyholds did not belong to the trust, but the Vice-Chancellor of England held that whether the purchase was or was not authorised by the settlement, still as between the trustees and the husband the property was trust property. The case was in fact the common case of tracing trust money into land, the whole doctrine as to which you will find fully discussed in *Lench v. Lench* (c), decided by Sir William Grant.

These cases of following trust money into land have occasionally some slight points of contact with the cases of performance properly so called; but in their leading features they are essentially different. Thus

(a) See *Taylor v. Plumer*, 3 Maule & Selwyn, 562; and the cases collected in *Lewin on Trusts*, 645, note (c) (5th edit.).

(b) 17 Simons, 111.

(c) 10 Vesey, 511.

in the ordinary case of performance the claimant is told that his claim is in truth satisfied by some act done in performance of the prior obligation entered into; while in the cases of following trust money the endeavour is to show, that even though the money be not clearly traceable into the land, the land must be presumed to have been purchased with the trust money for the purposes of the trust (a).

A few words are all that I can give to the cases represented by *Blandy v. Widmore*. That was in all strictness a case of actual performance. The husband covenanted to leave (it was not said by will), and he did *leave*.

But the doctrine is not confined to cases so favourable as that of *Blandy v. Widmore*. Thus it applies where the husband makes a will containing an attempted disposition of his property in contravention of his covenant, and where this attempted disposition failing, a share of the personal estate, by such failure, devolves on the wife (b).

It does not, however, apply where the thing covenanted to be secured is an annuity (c). Neither does it apply where performance in the technical sense is no longer possible by reason of the covenant having been broken in the intestate's lifetime, for then the case becomes one of *debt*.

Thus, suppose a covenant by an intended husband in a marriage settlement to pay a sum within two years

(a) See Lewin on Trusts, 581—587 (4th edit.); 645—649 (5th edit.).

(b) *Goldsmid v. Goldsmid*, 1 Swanston, 211.

(c) *Couch v. Stratton*, 4 Vesey, 391.

after marriage; the husband lives for two years; there-upon a debt arises, and nothing accruing to the wife by intestacy can possibly operate as a satisfaction.

With this meagre reference to the class of cases represented by *Blandy v. Widmore*, I must conclude my Lecture.

CONVERSION.

CONVERSION (the subject of this and my next Lecture) has been defined to be “that change in the nature of property by which, *for certain purposes*, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such.”

Perhaps, on the whole, the best general statement of the doctrine is that contained in the judgment of Sir Thomas Sewell in *Fletcher v. Ashburner* (a), who there says :—

“ Nothing is better established than **this** principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner

(a) 1 Brown's Chancery Cases, 499.

“ of the fund or the contracting parties, may make
“ land money, or money land.”

Sir Thomas Sewell, as you observe, makes the doctrine rest upon the intention of the testator, settlor, or other author of the trust : and doubtless this is the true principle.

You are not, however, to suppose that it is necessary to find upon the face of the instrument of trust an express declaration that, though the land be not purchased, the money shall go as land ; or, though the land be not sold, the land is to go as money. All that is requisite is an absolute expression of intention that the money shall be laid out on land, or that the land shall be sold and turned into money. When once this intention is sufficiently expressed, the accidental circumstance that the money has in fact not been laid out in land, or the land in fact not been sold and turned into money, can have no effect ; for here the maxim of Equity applies—“ that what ought to be
“ done, shall be considered as done.”

Thus Sir Joseph Jekyll, in a case often quoted (*a*), says—“ The forbearance of the trustees in not doing
“ what it was their office to have done, shall in no sort
“ prejudice the *cestuis que trust*, since at that rate it
“ would be in the power of trustees, either by doing or
“ delaying to do their duty, to affect the right of other
“ persons, which can never be maintained ; wherefore
“ the rule in all such cases is, that what ought to have
“ been done, shall be taken as done, and a rule so
“ powerful it is, as to alter the very nature of things ;

(*a*) *Lechmere v. Earl of Carlisle*, 3 P. Wms. 215.

“to make money land, and on the contrary to turn
 “land into money. Thus money articulated to be laid
 “out in land shall be taken as land, and descend to
 “the heir; and, on the other hand, land agreed to be
 “sold shall be considered as personal estate.” And
 Lord Macclesfield (a), in considering a case where a
 sum of money had been devised to be laid out in the
 purchase of land, thus expresses himself:—“If the
 “purchase had been made, *it* [meaning the land]
 “must have gone to the heir; but if the trustee,
 “by delaying the purchase, may alter the right and
 “give it to the executors, this would be to make
 “it the trustee’s will, and not the will of the first
 “testator, which would be very unreasonable and
 “inconvenient.”

The test, therefore, in these cases of conversion is
 not—Has the author of the trust expressly directed the
 property to be treated as converted, whether *de facto*
 converted, or not?—for in such a case there could be
 no doubt. Neither is the question to be answered—
 Has the property been in fact converted?—for that is
 immaterial. But the true question is—Has the author
 of the trust absolutely directed the real estate to be
 turned into personal, or the personal estate to be turned
 into real?

Thus much for the general nature of the doctrine.

In passing to a more particular consideration, some
 doubt crosses one’s mind respecting the most con-
 venient arrangement of the subject. In practice cases
 of conversion commonly arise either—

(a) *Scudamore v. Scudamore*, *Precedents in Chancery*, 543.

First.—Under wills; and as respects these, either in reference to conversion of money into land, or land into money; or,

Secondly.—Under settlements, or other instruments *inter vivos*; and, as respects these again, either in reference to conversion of money into land, or land into money.

A consideration of the authorities in reference to what I may call this double twofold arrangement might be extremely instructive; indeed, I shall myself adopt a similar classification in reference to one portion of my Lecture. But this arrangement, although well adapted to show accurately the differences practically arising in the application of the doctrine, according as the instrument is a will, or one *inter vivos*, or the [conversion is one of land into money, or money into land, is hardly so suitable for exhibiting the broad general principles of the doctrine as that which I purpose adopting, and which is as follows.

1st.—What words are sufficient to produce a conversion.

2ndly.—At what time conversion takes place.

3rdly.—The general effects of conversion.

4thly.—The results of a total or partial failure of the objects and purposes for which conversion has been directed.

First.—What words will be sufficient to produce a conversion.

Here the principle is clear. You must find in the instrument (be it will or settlement) a clear, imperative

direction to *convert*,—*i.e.*, to lay out the money on land, or to sell the land for money.

There must be no option on the part of the trustee; for if we have an option, how can he be under any obligation? How can it be said that *he ought to have laid out the money on land, or sold the land for money?* What room is there, in fact, for the application of the maxim, that Equity considers that to have been done which *ought to have been done?*

I will cite to you two cases in illustration of what I have just said, one as applicable to conversion of money into land, the other of land into money, viz., *Curling v. May* (a) and *Polley v. Seymour* (b).

The facts of the former of these cases, as shortly cited in a later one, were as follows :—

“ A. gives 500*l.* to B. in trust that B. should lay out
 “ the same upon a purchase of lands, or put the same
 “ out on good securities, for the separate use of his
 “ daughter H. (the plaintiff’s then wife), her heirs,
 “ executors, and administrators, and died in 1729.
 “ In 1731, H., the daughter, died without issue before
 “ the money was vested in a purchase; the husband as
 “ administrator brought a bill for the money against
 “ the heir of H., and the money was decreed to the
 “ administrator, for the wife not having signified any
 “ intention of a preference, the Court would take it as
 “ it is found; if the wife had signified any intention,
 “ it should have been observed, but it is not reasonable

(a) Cited in *Guidot v. Guidot*, 3 Atkyns, 255; and see *Swann v. Fonnereau*, 3 Vesey, 41.

(b) 2 Younge & Collyer, Equity Exch. 708; and see *Rich v. Whitfield*, L. R. 2 Eq. 583.

“ now to give either her heir or administrator, or the
“ trustee, liberty to elect ; for Lord *Talbot* said, it was
“ originally personal estate, and yet remained so, and
“ nothing could be collected from the will as to what
“ was the testator’s principal intention.”

In the case secondly referred to, a testatrix devised the residue of her real and personal estate to W. S., his heirs, executors, and administrators, according to the different natures and qualities thereof, upon the trusts following, that was to say, “ upon trust to retain and keep the same in the state it should be in
“ at the time of her decease as long as he should think
“ proper, or to sell and dispose of the whole, or such
“ part thereof as and when he or they should from time
“ to time think expedient,” either by public auction or private contract, to any person or persons who should be willing to become the purchaser or purchasers ; and then upon trust to invest the money to be produced by such sale or sales, together with all ready monies of the testatrix, in his or their own name or names, and in that of two of the residuary legatees thereafter named, in the public funds, or upon real or government securities. The testatrix then directed that the said W. S., his heirs, executors, or administrators should stand possessed of and interested in all such the general residue of her real and personal estate, and from and after such sale, then of the stocks, funds, and securities whereon the same or any part thereof should have been invested, in trust, out of the rents, issues, and profits, interest, dividends, and proceeds thereof, to pay several life annuities ; and from and after full payment and

satisfaction thereof, the testatrix directed that the said W. S., his heirs, executors, and administrators, should stand possessed of all the said residue of her said real and personal estate and effects, and of the stocks, funds, and securities whereon the same or any part thereof should have been invested, and the rents, issues and profits, interest, dividends, and produce thereof, in trust for five of the said annuitants (including the said W. S.), in equal shares and proportions, as tenants in common, and for their respective heirs, executors, administrators, and assigns, according to the different natures and qualities thereof. The testatrix died, a suit was instituted for the administration of her estate, and the principal question for decision on further directions was, whether by the will of the testatrix the real estate was converted out and out. The point of the decision is contained in the following passage of the judgment of Mr. Baron Alderson:—"It seems to me that here the testatrix " has bequeathed her real estate to the trustee with " a discretion to sell or not to sell the whole or any " part of it: and, consequently, that, until he exercises that discretion, the property remains in the " state it was at the time of her death."

Here let me observe, that there are few doctrines of Equity more important to be borne in mind by every professional gentleman who sits down to pen either a will or a settlement than this doctrine of conversion. If he omit to do this, he runs great risk of leaving it doubtful on the face of the instrument, whether the subject-matter is to be treated as personal estate or

real estate. Nor is this a point on which a mere *passive* recollection is sufficient. The draftsman, in order to avoid confusion, must have his attention actively directed to the doctrine. Take as an illustration a settlement. The main point in every well-drawn settlement is to impress distinctly on all the property comprised in the same set of limitations or trusts a clearly defined character either of real or of personal estate, and this wholly without regard to what the property itself is truly and in fact. Thus, suppose it is intended that the settlement shall be a money settlement—then if land constitute part of the subject-matter settled, the land is conveyed upon an absolute trust for sale, and the proceeds of sale are settled. So if the settlement be of land, with limitations applicable to landed property, and the subject matter consist partly of personal estate, care is taken to impress that personal estate with the real estate limitations.

Again, throughout the respective settlements the utmost pains are taken to preserve in the first case the character of personalty, in the latter the character of land. Thus in the ordinary power contained in money settlements to invest in land, the very first trust of the land bought always is to resell, and the character of personal estate is thus carefully impressed upon the land purchased. Similarly the provisions in real estate settlements for temporary investment in the public funds, or on mortgage, are carefully so worded as to impress upon the temporary investment the quality of land. In truth one of the distinctive

features of a well-drawn settlement is a careful preservation to the property of one uniform quality, *i. e.*, always real estate, or always personal estate. Nothing is left uncertain, nothing left to the option of any party in this respect.

But to return to the question under discussion, *viz.*, What words will effect a conversion? I said the trust or direction to convert must be imperative. There must be no option. This proposition should be qualified by the statement that where the trusts or limitations are of a description exclusively applicable to one species of property, this circumstance has been deemed sufficient to outweigh any semblance of option. The decision in *Earlom v. Saunders* (a) supports this proposition.

In that case, William Powell by his will devised land to his wife for life, with remainders over, with remainder to W. and P. as tenants in common in fee. He directed his executrix to pay 400*l.* to his trustees, to be laid out in the purchase of land, *or* on any other security or securities as his trustees should think proper and convenient; and directed the lands and securities to be settled on the trustees in trust for his wife for life, and after to such uses, and under such provisions, conditions, and limitations as the land before devised. The intermediate limitations being at an end, and W. being dead, the estate came to P., an infant of the age of twenty, who made a will, and gave all his estate to the plaintiff; and afterwards died under age. The question was, whether the 400*l.*, which had not been laid out on land, could be con-

(a) Ambler, 241.

sidered as money, in which case P.'s will being good, under the then existing law, as a will of personal estate, the plaintiff would have been entitled to it; and it was argued for the plaintiff, that the trustees had a discretion to invest on land or on securities; but Lord Hardwicke, relying on the circumstance that the limitations were exclusively applicable to real estate, held, that the discretion to invest on securities must be confined to an intermediate investment until purchase of lands, and that the 400*l.* was real estate.

Secondly.—As to the time from which conversion shall be deemed to take place.

It is obvious that, in all cases of this kind, the terms of the instrument itself must be our guide. Thus, if there be a trust to sell upon the happening of a particular event which may or may not happen, clearly the conversion takes place only as from the time of the happening of that event, though of course the moment the event occurs the conversion takes place just as if there had been an absolute direction to sell at that time.

The case of *Ward v. Arch* (a) well illustrates the principle. There a testator gave all his estate and effects of what nature, kind, or quality soever, after payment of his debts, funeral and testamentary expenses, to trustees, their heirs, executors, &c., in trust, *in case there should not be sufficient to pay the annuity thereafter given to his wife*, to sell all his real and personal estate, and invest the proceeds in the

(a) 15 Simons, 389.

funds, and out of the dividends or the rents of his real estate, until the same should be sold, to pay his wife an annuity of 300*l*. The testator left no residuary personal estate, and the rents of his real estate were not nearly sufficient to pay his wife's annuity, but the real estate in fact remained unsold long after her death. The question was, whether the real estate was to be considered as absolutely converted into personalty. The Vice-Chancellor of England held, that it was, expressing himself thus : " This case must be " decided in precisely the same way as it would have " been if a suit had been instituted shortly after the " testator's death, for the administration of his estate, " and it had appeared that the income of his real and " residuary personal estate was not sufficient to pay " the annuity. It is quite plain from the words of the " will, that the trust for sale would have arisen as " soon as that fact was ascertained, and the Court " must have directed it to be carried into effect immediately."

So, in cases like that of *Polley v. Seymour* just referred to, where, up to a particular time, it is wholly in the discretion of a trustee whether the property shall or not be sold, the conversion takes place as from the time of sale. •

Subject, however, to the general principle that the terms of each particular instrument must be considered in reference to this, as indeed to every other question of construction arising upon them, the rule may be said to be, that in regard to wills, conversion takes place as from the death of the testator, and in regard

to deeds or other instruments *inter vivos*, as from the date of execution; and this, although the author of the trust may, upon the face of the instrument, contemplate the possibility of a postponement of the actual conversion of the property from considerations of convenience.

Thus if a testator by his will devises his real estate to trustees upon trust *with all convenient speed* to sell and dispose of such estate, and then proceeds to dispose of the produce of sale, nothing can be clearer than that, notwithstanding the power (nay, the duty) of the trustees to postpone the sale until an advantageous opportunity of selling shall occur; yet, as between the heir and personal representative of any person taking an interest in the proceeds, there is a conversion out and out, as from the date of the death of the testator.

As regards the time as from which, in the absence of special circumstances, conversion is to take place in the case of "a deed," I cannot do better than read to you the observations of Vice-Chancellor Wigram, in the case of *Griffith v. Ricketts* (a):—

"A deed differs from a will in this material respect: the will speaks from the death, the deed from delivery. If, then, the author of the deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and consequently at the time of his death. The deed thus altering the actual character of the property, is, so to speak, equivalent to

(a) 7 Hare, 311.

“ a gift of the expectancy of the heir at law to the
“ personal estate of the author of the deed. The
“ principle is the same in the case of a deed as in the
“ case of a will; but the application is different, by
“ reason that the deed converts the property in the
“ lifetime of the author of the deed, whereas, in the
“ case of a will, the conversion does not take place
“ until the death of the testator; and there is no
“ principle on which the Court, as between the
“ real and personal representatives (between whom
“ there is confessedly no equity) should not be
“ governed by the simple effect of the deed in de-
“ ciding to which of the two claimants the surplus
“ belongs.”

This rule received a strong application in the case of *Clarke v. Franklin* (a). There a settlement was executed of real estate by deed (not enrolled) to the use of the settlor for life, with remainder (subject to a power of revocation which he never exercised) to the use of trustees and their heirs, upon trust to sell and pay certain sums of money to persons named, or to such of them as might be living at settlor's death, and to apply the residue to charitable purposes. Some of the persons named survived the settlor, so that the purposes for which conversion was directed did not fail altogether, but the deed was void so far as it directed the proceeds of land to be applied for charitable purposes; and the question was, whether, under these circumstances, the surplus belonged to the heir, or to the next of kin, of the settlor. Vice-Chancellor

(a) 4 Kay & Johnson, 257.

Wood, founding himself upon a previous decision of Lord Thurlow (*a*), held that, notwithstanding the trust for sale was not to arise until after the settlor's death, the property was impressed with the character of personalty immediately upon the execution of the deed, and that the proceeds, so far as they were directed to be applied to charitable purposes, resulted to the settlor as personalty.

The Vice-Chancellor, in his judgement, after referring to Lord Thurlow's decision, in which the case was one of conversion of land into personalty, continued thus :—

“ The doctrine of the converse case of personalty
 “ directed by deed or will to be converted into land, is
 “ fully discussed by Lord Eldon in *Wheldale v. Par-*
 “ *tridge* (*b*), where, upon the special terms of the in-
 “ strument, it was held not to be one which upon its
 “ execution clothed the property with real uses ; but
 “ Lord Eldon said, that, but for those special provi-
 “ sions, and if there had been nothing more in the
 “ deed, the ‘ property would, *immediately upon the*
 “ ‘ *execution of the deed*, have been impressed with
 “ ‘ real qualities and clothed with real uses, and the
 “ ‘ money would have been land’ ; clearly recognising
 “ the rule that conversion takes effect from the moment
 “ of the execution of the deed ; and the rights of the
 “ parties, and the character in which the property is
 “ taken by them, are to be determined according to
 “ that conversion.

(*a*) *Hewitt v. Wright*, 1 Brown's Chancery Cases, 86.

(*b*) 8 Vesey, 227.

“ The principle of these authorities is, therefore,
“ clearly settled : and where, as here, real estate is
“ settled by deed upon trust to sell for certain speci-
“ fied purposes, and one of those purposes fails,
“ there, whether the trust for sale is to arise in
“ the lifetime of the settlor or not until after his
“ decease, the property to that extent results to the
“ settlor as personalty from the moment the deed is
“ executed.”

But while thus admitting the general doctrine that in the case of a deed conversion takes place as from the date of execution, we must be careful how we apply it to instruments, such as mortgage deeds, where the general intention of the author of the trust is not conversion, but merely the raising of money.

Thus take the case of *Wright v. Rose (a)*.

There Joseph Wright, being seised in fee of a freehold estate, borrowed 300*l.* from James Rose, the defendant, and secured the repayment of it, with interest, by executing a mortgage deed of the estate, with a power of sale, and by the terms of the deed it was provided that the surplus monies to arise from the sale, in case the same should take place, should be paid to Wright, his executors or administrators.

In 1822 Wright died intestate, and without ever having been married. All the interest due on the mortgage money had been duly paid by him up to the time of his death, but the principal remained unpaid. The interest that accrued due after his death having remained unpaid, Rose the mortgagee entered into

(a) 2 Simons & Stuart, 323.

possession, and afterwards sold the estate under the power of sale, for a sum which considerably exceeded the mortgage money and interest. The question was whether the surplus purchase monies were real or personal estate.

The judgement of Sir John Leach was in the following words :—

“ If the estate had been sold by the mortgagee in
“ the lifetime of the mortgagor, then the surplus
“ monies would have been personal estate of the
“ mortgagor, and the plaintiffs would have been
“ entitled. But the estate being unsold at the death
“ of the mortgagor, the equity of redemption de-
“ scended to his heir, and he is now entitled to
“ the surplus produce.”

Here the point which created the difficulty was that the ultimate limitation of the proceeds was to the mortgagor, his executors and administrators. And it was contended that this was equivalent to an express conversion in the event of the power of sale being exercised. If that intent could have been collected then certainly the circumstance that the power of sale was exercised after the death of the mortgagor ought, according to the cases just referred to, to have carried no weight; but the true ground of decision, it is conceived, was the general nature of the transaction, viz., that it was a *mortgage*, and that it is no part or office of a mortgage to alter the order of devolution of property.

To the same ground must be referred the decision of the late Vice-Chancellor Wigram in the case of

Bourne v. Bourne (a). There B. being seised in fee of real estate, the same was, upon the occasion of an advance of money to him, conveyed to a trustee, in trust to permit B. to receive the rents and profits until the loan became payable, and upon payment of the principal and interest of the mortgage debt as therein mentioned, to reconvey the estate to B., his heirs and assigns, but if default should be made in payment, then that the trustee should enter into possession of the premises, and at his discretion sell the same, and pay over the residue or surplus (after the payment of the debt, interest, and costs) to B., his heirs, executors, administrators, or assigns. Default was made in payment, but no sale of the estate took place until after the death of B., who devised it to the plaintiff for life, with remainder over in tail: It was held that there was no conversion, but that the surplus proceeds passed by the devise as real estate.

Of the soundness and good sense of these decisions one can feel little doubt. At the same time I wish you to observe that in the latter case Vice-Chancellor Wigram rather lays stress upon the circumstance that the mortgagee's trustee had merely a discretion to sell, which he did not exercise until after the mortgagor's death, and that in consequence of this circumstance the proceeds belonged to the mortgagor's heir.

It is difficult to reconcile this view with an extremely anomalous and unfortunate class of decisions which I am now about to bring to your notice—I mean those,

(a) 2 Hare, 35.—See and distinguish *In re Underwood*, 3 Kay & Johnson, 745.

of which the principal are, *Lawes v. Bennett* (a) and *Townley v. Bedwell* (b).

The facts of the former case are concisely stated by Lord Eldon, in giving judgment in the latter.

The material facts of *Townley v. Bedwell* were these : A lease had been executed by the testator in the cause to Townley for thirty-three years, with a proviso that, if Townley, his executors, administrators, or assigns, should be desirous to purchase the premises within six years, he, his executors, administrators, or assigns, should pay to the testator, his heirs or assigns, 600*l.* for the purchase, upon having a good title made to him, Townley, his executors, administrators, or assigns. The testator died before the expiration of six years from the date of the lease. After his death, and within that period Townley declared his option to purchase according to the proviso ; and it was held that the purchase money belonged to the personal representative.

The danger of these decisions is manifest. If an option of this kind can alter the entire quality of property after the lapse of two years, it may do so after a lapse of ten or fifteen ; and during the whole of that time the rights of the next of kin and of the heir at law may be left in an uncertain and precarious state, dependent in fact on the option of a third party.

This in truth was what actually occurred in the recent case of *Collingwood v. Row* (c); in which, by

(a) 1 Cox, 167 ; see also, 14 Vesey, 596.

(b) 14 Vesey, 591.

(c) 3 Jurist (N.S.) 785.

an agreement dated 21st March, 1839, an option to purchase was conferred, and it was held that this option, when exercised fourteen years afterwards, in 1853, operated to convert real estate into personalty. The general dislike of owners of land to confer optional rights ranging over long periods, must no doubt render cases of this description rare; but it is difficult to exaggerate the inconvenience of the doctrine, and it is much to be regretted that the rule should not have been adopted of treating the property over which the option may extend as land subject to the option.

You may, I think, take for granted that the doctrine of *Lawes v. Bennett* will receive no extension, it having been disapproved more or less by almost every judge under whose consideration it has come, even by those who have followed it; but, in *principle*, the distinction is extremely thin between cases of this class, and those where property is vested in a mortgagee, subject to a power of sale—that is to say, subject to an option—under which he has right to sell the property and convert it into money.

Thirdly.—As to the effects of conversion.

These have been generally stated to be, to make personal estate real, and real estate personal.

Thus, take money directed to be laid out on land.

(a.) It was, of course, descendible to the heir.

(β.) Again, when property of this description belonged to a married woman, her husband was entitled to an estate by the curtesy out of it (a).

(a) See *Sweetapple v. Bindon*, 2 Vernon, 536.

(γ.) Again, under the old law, land was not liable to simple contract debts; and in the old cases *dicta* are to be found that money covenanted to be laid out in the purchase of land, stood on the same footing as land, and was not liable to simple contract debts (*a*). On the other hand, an interest of this kind was, in Equity subject to a judgment debt, just in the same way as the land itself (*b*).

(δ.) Again, before Lord Langdale's Act (the Wills Act), an infant under the age of twenty-one (how early may be matter of doubt, but certainly at seventeen years old) might make a will of personal estate. Well, when an infant was absolutely entitled to money liable to be laid out in the purchase of land, he could not by will dispose of it during his minority. This was assumed in *Earlom v. Saunders* (*c*), just now referred to.

(ε.) So I apprehend (though I am not aware that the point has ever been distinctly decided) money liable to be laid out on the purchase of land could not, before the late Wills Act, have been devised by an unattested will. The will must, I conceive, have been executed with the formalities required by the Statute of Frauds. Certainly money of this kind would not

(*a*) The operation of this rule, if understood as applying in all its breadth, would be of the strongest kind. A man might die entitled in law to 1000*l.* cash, yet, because it was liable to be laid out in the purchase of land, his heir would, under the old law, take it free from any obligation to pay simple contract debts.

(*b*) *Frederick v. Aynscombe*, 1 Atkyns, 392.

(*c*) *Ambler*, 241.

pass by a will professing to deal only with personal estate (*a*).

So as to land absolutely directed to be sold, it is, as between all persons claiming under the author of the trust, to all intents and purposes, personal estate.

It seems necessary to qualify, in the words just used, the statement of the operation of the doctrine of conversion, it having been held, in certain cases, that persons not claiming in any way under the author of the trust, cannot invoke its aid (*b*). Thus, where land has been conveyed upon trust for sale, and to pay debts, and stand possessed of the residue upon trust for the settlor *as personal estate*, and before sale the settlor has died, it has been held that probate duty is not payable upon the settlor's interest in the surplus proceeds of the unsold lands. The result of the trust for sale, it is considered, is merely to create an equity as between the real and personal representative, and the Crown has no right, for merely fiscal purposes, to say that what is in fact real estate shall be deemed to be personalty (*c*).

(*a*) *Gillies v. Longlands*, 4 De Gex & Smale, 372.

(*b*) This qualification may now be regarded as unnecessary. According to the latest decisions (*Attorney-General v. Brunning*, 8 House of Lords Cases, 265; *Forbes v. Steven*, L. R. 10 Eq., 178) the anomalous exception commonly supposed to have been established by *Matson v. Swift*, 8 Beavan, 368, and *Custance v. Bradshaw*, 4 Hare, 315, does not exist.

(*c*) *Matson v. Swift*, 8 Beavan, 368. So it was held, that the Crown could not claim by forfeiture a felon's share of proceeds of real estate, unless actually converted; *Thompson's Trusts*, 22 Beavan, 506. But see the last previous note. And as respects forfeiture, the student should bear in mind that forfeitures for treason and felony have been recently abolished by the 33 and 34 Vict. cap. 23, which contains detailed provisions for the management and application of the property of convicted persons.

Fourthly.—I proceed now to the last head of my lecture,—viz., the results of a total or partial failure of the purposes for which the conversion is directed.

In the consideration of this branch of the subject, it will be more convenient to consider separately each of the four classes of cases adverted to at the outset of my lecture,—i.e.,

1st.—Cases arising under wills, and separately in respect of these—

(a.) Cases of conversion of land into money; and

(β.) Cases of conversion of money into land.

2ndly.—Cases arising under settlements or instruments *inter vivos*, with a similar subdivision.

1.—(a.) And first, as regards wills, and as to cases of conversion of land into money.

Take a simple case. A testator devises all his real estate to trustees, upon trust to sell and divide the proceeds of sale equally between A. and B. What is the result when A. and B. both die in the testator's lifetime? and what when one only of them (say A.)? In the first case, you observe, the purposes for which the conversion was directed fail *totally*: A. and B. are both dead. The whole object of the conversion is at an end. In the second they fail *partially* only; because B., one of the two legatees, has survived, and is entitled to have the land sold, and to receive a moiety of the proceeds. In each case there is a lapse. In the first case, the whole land is undisposed of by the will; in the second, one moiety of the proceeds of sale is undisposed of.

Under these circumstances, two principal questions arise,—viz.,

First.—To what extent is the trust for conversion still in force ?

Secondly.—Who is to benefit by the lapse—the heir or the personal representative ?

Where *both* A. and B. are dead, both these questions admit of a ready answer. For since both A. and B. are dead, the whole purpose and object of the testator in directing a conversion has failed. The conversion was directed simply with a view to the division of the proceeds, and there being no one to receive any share, the matter is in the same position as if no trust to sell had ever been inserted in the will, and the land descends to the heir.

Of course you must understand me as putting a simple case of trust to sell and pay half of the proceeds to A., and the other half to B. If any other trust attached upon the proceeds, say a trust for payment of debts and legacies, and there were debts *or* legacies to be paid, then the case would no longer be one of total failure of the purposes for which the conversion was directed ; but it would fall within the same principle as the case now next to be considered, viz., where A. alone dies.

Next, then, how does the matter stand when A. alone dies ? Here the trust for conversion still subsists, for without its exercise, B., the survivor, cannot receive his moiety of proceeds : the other moiety therefore is, by virtue of the will, a moiety of personal estate. To whom then shall this lapsed moiety, which

by the doctrine of conversion is personal estate, belong? To the heir, or to those entitled under the will to the personal estate?

This was the question in the great case of *Ackroyd v. Smithson* (a), in which, according to tradition, Lord Eldon earned his earliest laurels, by establishing that the right, under these circumstances, was with the heir, and not with those entitled to the personalty.

It seems indeed impossible to deny the validity of the heir's right. The testator has, it is true, directed the land to be sold, and it still must be sold, but that is for the purpose of giving B. his moiety of proceeds. But where on the face of the will can you discover any trace of intention to give the other moiety of proceeds to the next of kin? The next of kin take the testator's personal estate by "act of law," but they can take his real estate, or the proceeds of his real estate, as legatees only, and by virtue of some intention to that effect on his part. It is, however, clear that the testator never meant to give *them* anything.

The result therefore is that, as between the heir and next of kin, the former will take A.'s moiety of proceeds. As between the heir at law and a residuary legatee the result may occasionally be different, as in cases where a testator shows an intention that the proceeds of sale shall, for all intents and purposes, be deemed part of his personal estate (b).

Neglecting, however, any such special claim founded

(a) 1 Brown's Chancery Cases, 502.

(b) See Lewin on Trusts, 121—123 (4th ed.), 128—130 (5th ed.).

on the peculiar frame of any given will, the result may be thus summed up :—

When the trust for conversion fails wholly, the heir takes the land as real estate.

When the trust for conversion fails partially, the heir takes the share of proceeds but as personal estate (*i.e.*, it would go to his, the heir's, personal representative or next of kin).

In *Smith v. Claxton* (a), you will find each of these cases very well illustrated.

1.—(β.) Next, as regards the case of a will, and of money directed to be laid out in the purchase of land.

Singularly enough, it was for a long time doubtful upon the authorities whether, in the case of a testator bequeathing a sum of money to be laid out in the purchase of land, to be settled upon trusts, which failed wholly or partially, the heir had not an equitable right to the lapsed interest in the money so bequeathed.

It was, in fact, reserved for Lord Cottenham to set this question definitively at rest by deciding that the analogy of the cases with regard to conversion of real estate into personal held perfectly, and that the money fund, on failure of the trusts respecting the real estate, went to the next of kin or residuary legatee. I allude to the case of *Cogan v. Stevens* (b), where a testator gave a sum of 30,000*l.* to be laid out on land which was to be settled on various relatives in succession, with an ultimate trust for a charity. The money was

(a) 4 Maddock, 484; and see *Jessopp v. Watson*, 1 Mylne & Keen, 665.

(b) 5 Law Journal (N.S.), Chanc. 17.

never laid out, and all the valid trusts having failed or expired, and the trust for charity being invalid, the question arose who was entitled to the 30,000*l.*? and Lord Cottenham decided that it fell into the residue of the personal estate (*a*).

2.—Let us now take the case of a total or partial failure, where the trust for conversion is created by settlement or other instrument "*inter vivos*," and adopt the same order as that pursued in regard to wills.

2.—(*a*.) And first in reference to a conversion of land into money. Suppose, for instance, a conveyance of real estate by deed upon trust to pay the rents and profits to the settlor during his life, and *after his death* to sell and pay one moiety to A., if then living, and the other moiety to B., if then living. Now, how will the case stand if both A. and B. die in the settlor's lifetime? And how will it stand if A. alone so die?

At first, I think, it might strike you that this is the same identical case as that first put with reference to a will, but it is only up to a certain point that it runs on all fours.

As regards the question of conversion the cases are exactly parallel. Where A. and B. both die, the trust for conversion fails altogether. Where A. only dies,

(*a*) This decision was followed by Lord Hatherley (when V.-C. Wood) in *Reynolds v. Godlee, Johnson*, 536, see p. 582; which case also establishes that where money is directed to be laid out in land to be held on trusts which do not exhaust the whole interest, and in consequence the money devolves on the next of kin of the author of the trust, the next of kin take the money as personal estate, and not, as a rigid application of the decisions in reference to conversion of land into money might seem to require, as realty.

it still subsists, a sale being still requisite for the purpose of giving B. his moiety of proceeds.

But as to the person who is to reap the benefit of the death of the *cestuis que trust*, there is a material distinction. Where both A. and B. die, and the trust for conversion is gone altogether, the heir will of course (as in the case of the will) take ; for the land, there being no trust to convert, still remains land. But where A. alone dies, the case is no longer similar to that arising under a will. There is now, as shown, a valid trust for conversion. What remains undisposed of by the deed is a moiety of the proceeds of sale. This is personal estate. When did it become so? According to the rule given in the earlier part of the Lecture, the answer is, at the date of the execution of the deed of settlement, and not merely when the trust for sale arose. The settlor, therefore, *in his lifetime*, took immediately on A.'s death, by way of resulting trust, this moiety of personal estate, and it forms part of his general personal estate, and must devolve as such.

This was the true point of the decision in *Clarke v. Franklin* (a) already discussed. There the conveyance was by deed. The first trust was for the settlor for life ; next came a trust to sell, then a trust to pay certain small sums (which was a *valid trust*), and all the remaining trusts were for charity and invalid. The result was, that, immediately upon execution, the property was impressed with a valid trust for conversion, and, simultaneously, the settlor took under

(a) 4 Kay & Johnson, 257.

the deed, by way of resulting trust, and as personalty, so much of the proceeds of sale as was invalidly given to charity.

2.—(β.) The only remaining case is that of a conversion of money into land by settlement; and here too the analogy is perfect. Thus a man on his marriage covenants to pay 1000*l.* to trustees, to be laid out on land, to be settled to the use of himself for life, remainder to the use of his wife for life, remainder to the children of the marriage, remainder to his own right heirs.

Now, suppose first that his wife dies in his lifetime without issue. Here all the uses of the land, except for the benefit of the settlor himself, are gone. The purposes of the trust for conversion are at an end altogether. The money is, as the phrase is, at home in the settlor's pocket; there is no obligation on his part to lay it out, and no room for the application of the maxim, that Equity considers that done which ought to have been done—for the settlor could be under no obligation to himself or his heir (*a*).

But if, on the other hand, the wife had outlived the husband, were it only for a week, then the trust had not wholly failed, then there was an obligation to pay the 1000*l.* to be laid out on land, then Equity will consider that done which ought to have been done, and will, at the suit of the heir of the settlor, order the money to be laid out or paid to him (*b*).

(*a*) *Pulteney v. Darlington*, 1 Brown's Chancery Cases, 223.

(*b*) *Lechmere v. Lechmere*, Cases, *temp.* Talbot, 80.

CONVERSION.—LECTURE II.

THE task which I propose to myself this evening is to complete as far as I am able the general sketch of the doctrine of *conversion*, which I commenced when we last met.

On that occasion I endeavoured to explain—

(1.) What language was sufficient to produce a conversion.

(2.) The time as from which conversion took place.

(3.) The effects of conversion.

(4.) The results of a partial or total failure of the purposes of conversion.

My treatment of the subject was necessarily not very minute or detailed, yet still, I trust, sufficiently so to convey the general principles of the doctrine; and it is not my intention, on the present occasion, to enter with any great minuteness upon the points then discussed. My chief object now is to touch upon a few questions intimately connected with the general doctrine as then explained, yet admitting of a distinct consideration—to add, if I may be allowed the metaphor, the necessary offices and appurtenances to the main building which I attempted to construct at our

last meeting. This I shall do under two principal heads, viz. :

(I.) Conversion by title or authority paramount.

(II.) Reconversion.

And, first, as to conversion by title or authority paramount.

You will remember that in every instance selected on the previous occasion for the purpose of illustrating the working of the doctrine, the question, whether in contemplation of Equity there was or was not conversion, was referred ultimately to the intention of the "author of the trust" as discoverable from the instrument of trust itself. The illustrations chosen were those arising either upon some will—and then the question was, had the "testator" on the face of the will shown an intention to convert out and out—or upon some settlement or other instrument "*inter vivos*," and then a similar question arose as to the intention of the "contracting parties." The continually recurring elementary question was in substance this: Has the author of the trust said that the land shall at all events be sold and turned into money? or, on the other hand, Has he said that the money shall at all events be laid out in land? And in each case, as I pointed out, assuming the answer to be in the affirmative, a Court of Equity holds that no accidental delay in effecting the intentions of the author of the trust shall vary the rights of parties. The Court treats as done that which ought to have been done, and views the land as money, or the money as land, in accordance with the positive directions of the testator or settlor.

I have thought it right thus to recall to you the leading features of the general doctrine of conversion in order to bring into more salient prominence the difference between these and those of the subject first selected for consideration this evening, viz. : “Conversion by title or authority paramount.”

By this phrase I mean to characterize those cases in which, without any wish or intention of the owner of property, its actual nature becomes, by the exercise of some legal paramount authority, changed from real estate to personal, or from personal estate to real. I shall not be able to refer to any instances in which the question has arisen with reference to a change from personal estate to real, but the principle would obviously be the same in either case.

The leading instances of conversion by authority paramount will, I think, be found to range themselves under one of the three following heads :—

- 1.—Conversion by Act of Parliament, as, for instance, where, under the authority of some railway or other Act, real estate is taken from the owner for a money consideration.
- 2.—Cases under the jurisdiction in Bankruptcy, where the real estate of the bankrupt is sold to pay his creditors.
- 3.—Sales under the jurisdiction in Chancery, where real estate is sold to pay debts or charges thereon.

In each of these cases the Legislature, or the Court of Bankruptcy, or the Court of Chancery, takes the property of the landowner, and by an authority alto-

gether superior to his wishes or intentions converts it *de facto* into money. And under these circumstances questions frequently arise respecting the extent to which this conversion operates as between the real and personal representative of the original owner.

Thus, as you see, the question here is *not*, Is the property, though not converted, to be treated as converted? but, Is it, though *de facto* converted, to be treated to any and what extent as not converted? The question is of a converse kind to that discussed on the occasion of our last meeting.

1.—Taking, first, cases of conversion by Act of Parliament, the simple point as to these is, what is the intention of the statute? The power of the Legislature is one to which all Courts must succumb. No rule of Equity can vary the expressed intention of an Act of Parliament; the question is, What has the Act said?

Yet even here, it may perhaps be laid down as a sound principle of construction, that Acts of Parliament authorising the property of private individuals to be taken for public purposes, ought to be construed so as to vary as little as possible the rights of third persons, and not to be extended beyond their main object. The main object of the Legislature is to acquire the land for purposes of supposed public benefit, not to change the quality of the property.

Subject, however, to this general principle of construction, the will of the Legislature, of which it has been said that it can do almost anything—short of making a man a woman, or a woman a man—is the sole guide.

The case of *Richards v. Attorney-General of Jamaica* (a), affords a good illustration of the powerful operation of conversion by Act of Parliament.

A testator resident in Jamaica, and seised of plantations and slaves in the Island, by his will, dated June, 1834, after giving certain bequests, proceeded as follows :—"Also I give, devise, and bequeath, share
" and share alike, unto Rosanna Richards and her
" children, all my right, title, and claim to compensa-
" tion, such as may be awarded to me, as my portion
" of the compensation fund, for the emancipation of
" such slaves as may belong to me, and be living, on
" the 1st of August, 1834." This will was not attested so as to pass real estate; but was properly executed to pass personalty. By the law of Jamaica, slaves could only be devised by a will executed with the formalities requisite in the case of real estate. The Act for the abolition of slavery (3 & 4 Will. 4, c. 73, passed on the 28th of August, 1833) provided that, on the 1st of August, 1834, slavery should cease in the British dominions, and gave to the owners of the slaves a right to their services as apprentices, and to a money compensation for the loss of their services as slaves. The testator died before this period of manumission arrived. The Court in Jamaica decreed, that the compensation money partook of the nature of real estate to the same extent as the slaves, and did not pass under the will. The Judicial Committee of the Privy Council, however, upon appeal, decided that (treating the slaves as real estate) the Legislature became pur-

(a) 6 Moore's Privy Council Cases, 381.

chasers, under 3 & 4 Will. 4, c. 73, from the date of the Act, the vendor retaining a limited interest in the slaves for a term of years, and that the money to be received under the compulsory sale of the slaves was personal estate, and passed to Rosanna Richards and her children as specific legatees under the will.

But while acknowledging the absolute necessity of making the very words of the Act of Parliament our guide in questions of this class, it is, notwithstanding, possible to attempt some general classification of the cases arising under the Acts of Parliament authorizing the taking of lands for public purposes, and more especially under the "Lands Clauses Consolidation Act, 1845" (a), an Act which is almost invariably incorporated into recent Acts authorizing the expropriation of land.

The persons whose land is thus forcibly taken from them may commonly be ranged under one of the three following heads :—

- a. Persons who, being absolutely entitled, submit to the compulsion put upon them, and contract for the sale of their land.
- β. Persons who, though absolutely entitled, will not so submit.
- γ. Persons under disability, or persons having only limited interests (*i.e.*, cases where the land is in settlement).

a.—In the first case, viz., that of a person absolutely entitled but contracting, though under compulsion, for

(a) 7 & 8 Vict. c. 18.

the sale of land, the case is pretty clear. Induced by the pressure of the Act of Parliament he sells his land—he becomes a party to its conversion; and the purchase-monies, though not actually paid at the date of his death, are to all intents and purposes personal estate (a).

β.—Where the person absolutely entitled refuses to concur in effecting the sale and receiving his purchase-money, the Legislature has provided means for acquiring the property in despite of his resistance; and the purchase-money is (under the 76th clause of the Lands Clauses Consolidation Act) paid into the Bank of England under such circumstances as to effect a conversion out and out, *i.e.*, the purchase-money is personal estate (b).

γ. Where the land purchased is in settlement, or where the owner is an infant or a lunatic (c), the purchase-money is paid into Court under the 69th section of the Lands Clauses Consolidation Act; and it is by the express direction of the Act liable to be laid out again on the purchase of land, subject to provisions for an intermediate investment on Government

(a) See *Ex parte Hawkins*, 13 Sim. 569.

(b) But a mere notice to treat, followed by the death of the landowner, without either contract or the exercise of the compulsory powers of the Act, is insufficient to effect a conversion; *Haynes v. Haynes*, 1 Drewry & Smale, 426.

(c) The decision, *Ex parte Flamank*, 1 Simons (N.S.), 260, must be viewed as resting on its own special circumstances. As respects land sold under the statutory jurisdiction in lunacy, it is to be observed that the proceeds of sale are, by the statute, carefully impressed with the nature and quality of the land sold; see 16 & 17 Vict. c. 70, s. 119; *Re Wharton*, 5 De Gex, Macn. & Gor. 33.

Stock; and the money is therefore, in the eye of a Court of Equity, land.

In a recent case (a), Vice-Chancellor Kindersley thus summed up the decisions:—"It appears then, upon the authorities, that when the circumstances of the case have brought it under the 69th section of the Lands Clauses Consolidation Act, the money has been held to bear the character of realty; but if, on the other hand, the circumstances have brought the case under the 78th section of the Lands Clauses Consolidation Act, then the money has been held personalty."

The general result of these Acts may then be said to be, that when an owner is "*sui juris*" and absolutely entitled, a conversion is intended to be effected: and this seems not unreasonable, for he can himself regulate the interests *inter se* of his real and personal representative. Where, on the other hand, the owner is not *sui juris* or the property is in settlement, then the quality of the property is not intended to be altered, and the money stands in the place of the land *as land*.

2. Next as to conversion under the paramount authority conferred by the Bankruptcy Laws.

The case of *Banks v. Scott* (b), decided by Sir John Leach, may be usefully referred to upon this point.

In that case, *Scott, Nicholson, and Smith* carried on business as bankers in partnership, and were interested in the profits and losses in various proportions. A commission of bankruptcy was awarded against

(a) Harrop's Estate, 3 Drewry, 733.

(d) 5 Maddock, 493.

them, and the full amount of the joint and separate debts of the bankrupts with interest was paid. To complete such payment, real estates of great value belonging to the bankrupt *Scott*, were sold, and on the whole, *Scott* contributed upwards of 46,000*l.* beyond his proportionate share of the losses of the firm. Parts of the estates were sold during the life of *Scott*; parts were contracted to be sold, but not sold at the time of his death, and the remainder were sold after his death, and a surplus remained in the hands of the assignees. The question was, what were the rights of the heir of *Scott* in respect of the surplus produce of sale of the estates sold under the bankruptcy? Sir John Leach in his judgment expressed himself thus:—

“As to the real estate sold or contracted to be sold during the life of the bankrupt *Scott*, it must at his death be considered as converted into personalty; but as to the real estate which was unsold and uncontracted for at the death of the bankrupt, it is to be considered as descending to his heir, subject to the charge created by the provision of the Bankruptcy laws for the payment of his debts. It can make no difference in principle, whether such a charge be created by the provision of the law or the provision of the party. As far as the real estate is not exhausted by that charge, it is the property of the heir.”

The question, whether even the surplus proceeds of real estate sold in the bankrupt's lifetime might not have been held to be real estate, seems hardly to have been argued; and it may be doubted whether,

according to the principle of the next decision to which I shall refer, the point might not have been successfully pressed.

3. As to conversion by the Court of Chancery.—Where landed property is subject to debts and charges, say, where a landowner dies indebted, testate or intestate, the Court, as you are aware, has power to sell his land for payment of his debts. But obviously it is impossible so exactly to measure the quantity of land required for payment of debts as not in some degree to sell more than necessary. A question then arises, what is the character of the surplus proceeds? Real estate or personal. This point is covered by a decision of the present Master of the Rolls in *Cooke v. Dealey* (a).

In that case the testator, Samuel Cooke, directed that all his debts should be paid by his executors out of his personal estate. He devised his real and personal estate to his wife for life, and after her decease he bequeathed 1000*l.* to the plaintiff, and, subject thereto, he devised and bequeathed one fourth of his real and personal estate to his daughter, Eliza Dealey, and the rest to other persons.

The testator survived his wife and died in 1851.

A suit was instituted for the administration of the estate, to which Eliza Dealey and her husband were parties. By the decree, the usual accounts were directed, and the real estates were ordered to be sold

(a) 22 Beavan, 196. The student may with advantage read and distinguish the cases arising upon the felling and sale of timber, of which *Dyer v. Dyer*, 34 Beavan, 504, is one of the most recent.

for the payment of the debts and legacies ; and they were sold accordingly. Subsequently to the decree and to the sale, Eliza Dealey fell into a state of mental imbecility, and the estates, in consequence, were vested in the purchasers, under the Trustee Act. Eliza Dealey died, and in April, 1855, her husband took out administration. After payment of the testator's debts and legacies, there still remained a surplus of the produce of the real estate in Court. The husband and administrator of Eliza Dealey then presented a petition, whereby he claimed one fourth of the fund in Court as personal estate ; but this claim was contested by her heir-at-law, who insisted that the surplus fund still retained the character of realty.

In delivering judgement, the Master of the Rolls after referring to the general rule, that the conversion must take place only to the extent of the object required, and to certain cases in Lunacy which had been relied upon by the counsel for the husband, continued thus :

“ I think, however, that the authorities cited, and
“ rules in lunacy, do not alter the principle in these
“ cases. More of the real estate was sold than was
“ necessary ; of course, the conversion is complete to
“ the extent to which the purchase-money was re-
“ quired for the particular object for which the sale
“ took place, namely, for the payment of the debts and
“ costs, but the excess, though in the form of money,
“ remained, as before, impressed with the character
“ of land.”

(II.) I pass to the subject of reconversion.

By reconversion I mean that notional or imaginary process by which a prior constructive conversion is annulled and taken away, and the constructively converted property restored in contemplation of a Court of Equity to its original actual quality. Thus real estate is devised upon trust to sell and to pay the proceeds to A. By virtue of this absolute trust the real estate is in Equity converted into personal estate. It belongs to A. as personalty. It may, however, be made A.'s property as real estate. In that event it is said to be reconverted; and the process is called "Reconversion."

The origin and efficacy of reconversion consists in the right of every absolute donee or owner to dispense with, or forbid the execution of, any trust in the performance of which he alone is interested.

Thus, if a testator by his will directs his executor to lay out a sum of 1000*l.* in the purchase of an annuity, the annuitant has a right to say to the executor, "Give me the 1000*l.* I prefer that the annuity should not be purchased" (a). The annuitant under these circumstances is said to exercise his right of "election" to take the fund directed to be laid out on the annuity, instead of the annuity itself.

This is a principle of very wide range. Its application to cases of conversion is at once apparent. In

(a) *Bayley v. Bishop*, 9 Vesey, 6. And even where no definite sum is named, but the direction is to purchase an annuity of a given amount, the annuitant is entitled to claim the sum which the annuity would have cost; *Ford v. Batley*, 17 Beavan, 303.

the case just supposed, of lands devised upon trust to sell and pay the proceeds to A., A. is entitled to the proceeds of sale; and being absolutely entitled, he has a right to dispense with the execution of the trust for sale, in which he alone is interested. He has a right to "*elect*" to take the land instead of the proceeds of sale. This right of election forms the groundwork of the doctrine of reconversion. In truth it may be said that reconversion depends upon "*election*."

I may as well point out the different sense in which I am now using the word "*election*," from that in which it was used when discussing in a former lecture the doctrine of election commonly so called. *Then* I treated of the *obligation* to elect between two species of property or benefits. *Now* I am speaking of the *right* to elect to take, in lieu of the proceeds or fruit of any given property, the property itself.

Reconversion then depends upon election, or rather upon the right of election; and the consideration of the question of reconversion may therefore be conveniently considered under the two following heads, namely:—

1. Who may elect so as to effect a reconversion.
2. How an election may be made, so as to produce that effect.

And, first, who may elect?

It seems to flow from the mere statement of the general principle, that, where the person absolutely entitled to the property in question is under any personal incapacity, the right of election cannot be exercised. For how can a person, who is under incapacity,

as an infant or a lunatic, be permitted to alter the nature of the property to which he is entitled? Accordingly it is well settled that where property which, in contemplation of Equity, is converted either from real into personal or from personal into real, belongs either to a lunatic or to an infant, there can be no reconversion. Thus, in *Seeley v. Jago* (a), Lord Chancellor Cowper, speaking of the share of an infant of a sum of money directed to be laid out on land, said that it must be put out for the benefit of the infant, he, by reason of his infancy, being incapable of making an election. And in *Ashby v. Palmer* (b), where there was a trust for sale of real estate, and one of the daughters of the testatrix was a lunatic, Sir William Grant, after saying that a testator may dispose of his property as he pleases, continues thus:—

“In the will now before me, it is clearly given by the testatrix to her daughter *only as money*. When she arrived at twenty-one, it might be that the whole would remain unsold, and then she might have elected to take it as land; or, if she had kept it unsold, being competent to make an election, she might have been presumed to have so made her election. Here she was manifestly incompetent to make any: and it is as if she had died before the time arrived at which she could have elected.”

So much for the case of lunatics and infants. The qualified personal incapacity of a married woman demands a more particular consideration.

(a) 1 Peere Williams, 389.

(b) 1 Merivale, 296. And see *Re Wharton*, 5 De Gex, Macn. & Gor. 33.

And first, suppose the case of money directed to be laid out in the purchase of land, and the *feme covert* absolutely entitled to the land. In this case, before the late Fines and Recoveries Act, it was not uncommon, when the husband and wife wished to acquire an absolute interest in the money, to make a fictitious purchase. Thus, assume 5000*l.* liable to be laid out in land, to which the wife was entitled in fee. A friend was applied to, who, in consideration of the 5000*l.*, conveyed land to the wife. Then the husband and wife sold the land back for the same 5000*l.*, levying a fine of the land.

There was, however, a mode of avoiding this circuitous process, which is thus described by Lord Hardwicke in the case of *Oldham v. Hughes* (a):—

“ As to Mrs. Bourne’s capacity, if this money is to
 “ be considered as real estate, she is a *feme covert*, and
 “ cannot alter the nature of it barely by a contract or
 “ deed ; for, to alter the property of it, or course of
 “ descent, this money must be invested in land (and
 “ sometimes sham purchases have been made for that
 “ purpose), and she may then levy a fine of the land,
 “ and give it to her husband or anybody else. There
 “ is a way also of doing this, without laying the money
 “ out in land, and that is, by coming into this Court,
 “ whereby the wife may consent to take this money as
 “ personal estate ; and upon her being present in
 “ Court, and being examined (as a *feme covert* upon
 “ a fine is), as to such consent, it binds this money
 “ articulated to be laid out in land, as much as a fine at

(a) 2 Atkyns, 453.

“ law would the land, and she may dispose of it to
 “ the husband, or anybody else ; and the reason of it
 “ is this, that at law, money so articed to be laid out
 “ in land is considered barely as money till an actual
 “ investiture, and the equity of this Court alone views
 “ it in the light of a real estate, and therefore this
 “ Court can act upon its own creature, and do what a
 “ fine at Common Law can upon land ; and if the
 “ wife had craved aid of this Court in the manner I
 “ have mentioned, she might have changed the nature
 “ of this money which is realised, but she cannot do
 “ it by deed.”

Next, as regards land directed to be sold, and the proceeds to be paid to a married woman.

Here the husband and wife might, under the old law, so long as the land remained unsold, by levying a fine, bar all the wife's interests in the proceeds to arise from the sale of the land. This was the point in *May v. Roper (a)*.

There a married lady, being entitled to a share of the proceeds of real estates directed to be sold, joined with her husband in assigning, and levying a fine of, her share to a mortgagee ; and it was decided that she was barred of her equity to a settlement, the late Vice-Chancellor of England saying that “ it seemed to him he ought to hold that the fine barred the wife of all interest that she could derive either from the land or the proceeds of sale of it.”

The result, therefore (leaving out of consideration the

(a) 4 Simons, 360.

Fines and Recoveries Act, to which I shall presently allude), was, that in the case of a married woman entitled either to land to be purchased with money, or money to arise from the sale of the land, the husband might acquire the property in its unconverted state, although the wife had in strictness no capacity to elect; that is to say, in the case of money directed to be laid out on land, either by making a sham purchase and levying a fine of the land fictitiously purchased, and reselling, or by consenting in Equity after the mode suggested by Lord Hardwicke; and in the case of money to arise from the sale of land, by levying a fine.

Such was the state of the old law; and under the Act for the Abolition of Fines and Recoveries, the result is precisely similar. That Act in substance says (*a*), that a married woman may, with the concurrence of her husband, and with the formalities there prescribed, dispose of any estate at Law or in Equity, or any *interest* (I condense the words purposely) in any lands, or money to be laid out in the purchase of lands.

In cases therefore where, at the present day, a married woman is entitled to money directed to be laid out on land, all that is requisite in order to acquire full dominion over the money is, that she and her husband should, by deed acknowledged by her, assign the money to a trustee of their own nomination. An absolute title is thus acquired in the money discharged from the trust for investment; and thus,

(*a*) 3 & 4 Will. 4, cap. 74, s. 77.

at the option of the husband and wife, though not in strictness by mere *election*, a reconversion into money is effected.

Next, as to land directed to be sold, the proceeds of sale whereof are payable to a married woman.

The Fines and Recoveries Act, as I stated just now, enables a married woman to dispose of *any interest* in land; and it is impossible to deny that the proceeds to arise from the sale of land are an interest in land. Indeed, so strong is the operation of the statute, that it is held that although a married woman cannot in general dispose of her interest in personal estate, so as to bind her right by survivorship (*a*), yet where that personal estate consists of monies to arise from the sale of real estate, she may do so by deed acknowledged (*b*), the subject-matter of disposition being then an interest in land, and falling therefore within the words of the statute. This was the point decided in *Briggs v. Chamberlain* (*c*).

There a married woman, being entitled to a share of the proceeds of real estate directed to be sold, by deed acknowledged, joined her husband in a mortgage thereof, the effect of which mortgage was the point for determination. The Vice-Chancellor, after stating the words of the Act, continued thus:—

“ These words, therefore, enable a married woman,

(*a*) Pp. 123–126, *ante*.

(*b*) Of course any election by the husband and wife by deed not acknowledged would be unavailing: see *Sisson v. Giles*, 32 Law J. (N.S. Chanc. 606; 3 De Gex, J. & Smith, 614; *Franks v. Bollans*, L. R. 3 Ch. App. 717.

(*c*) 11 Hare, 69; and see *Bowyer v. Woodman*, L. R. 3 Eq. 313.

“ by her deed acknowledged according to the provisions
“ of the Act, to dispose of any interest in land, either
“ at law or in equity, or any charge, lien, or incum-
“ brance in or upon or affecting land, either at law or
“ in equity. Now, what is the property in question ?
“ It is an interest in land which has been given by the
“ will of the testator to a lady who has executed a
“ disposition under this Act. The argument which has
“ been addressed to the Court against giving effect to
“ the disposition so made, has been—that, as the land
“ was directed by the will to be, and has been, converted
“ into money, the Court will regard it as money only,
“ and, therefore, as a species of property which could
“ not be disposed of by means of a fine, and cannot
“ now be disposed of by any conveyance substituted for
“ a fine. I should have had no doubt or hesitation in
“ saying that the interest of this lady under the will
“ of the testator might be disposed of by deed executed
“ and acknowledged according to the Act, if it had
“ not been for the case of *Hobby v. Allen*, in which
“ the then Vice-Chancellor *Knight Bruce* is reported
“ to have come to a different conclusion. This decision
“ directly conflicts with the case of *May v. Roper*.
“ I cannot distinguish the two cases. A difference
“ suggested is, that in one case the interest was
“ reversionary; but the question does not turn on
“ the difference between an interest in possession
“ and an interest in reversion. The question is,
“ whether it is an interest in land which can pass by
“ a fine, or by a deed having a like effect.” And,
after further discussing the authorities, the Vice-

Chancellor held that the wife's interest was bound by the deed (a).

It results then that a married woman, absolutely entitled to the proceeds to arise from the sale of real estate, may, with the concurrence of her husband, make an absolute title to the proceeds, and when this is once effected the person so absolutely entitled, may claim the land discharged from the trust to sell, and thus effect a reconversion.

The question therefore, in respect to personal capacity of individuals to effect a reconversion, may be thus summed up :—A lunatic cannot elect or effect a reconversion ; neither can an infant ; but a married woman, although in strictness she cannot *elect*, can nevertheless, though the special powers of disposition belonging to her and her husband, effect a reconversion.

Next, as regards the quantity of interest requisite to be owned in order to effect a reconversion.

Hitherto I have assumed that the person entitled, either to the money laid out in land or to the land to be sold for money, is entitled to the whole *absolute interest in possession*.

But how will the case stand where a person is entitled, not to the whole subject-matter, but only to an undivided share ? Can he then elect ?

The answer to this question may be different according as the subject-matter consists either of money

(a) In *Tuer v. Turner*, 20 Beavan, 560, the same point was decided in the same way by the present Master of the Rolls ; and see *Bowyer v. Woodman*, L. R. 3 Eq. 313.

to be laid out on land, or land to be turned into money.

Take the last case first. Suppose land devised upon trust to sell, and to pay one moiety of the proceeds to A., and the other moiety to B. Here, how can A. alone, or B. alone, elect to take the land? Each is entitled to have the *whole land* sold. A sale of an undivided moiety would obviously produce a far less sum than would be receivable in respect of one half of the proceeds of sale of the entirety. What right has either to compel the other to forego a sale of the whole property? neither can, therefore, as against the other, elect to take any portion of the land *as land*; and there can, therefore, be no reconversion into land through the ordinary operation of the doctrine of election.

This was one of the points decided in *Holloway v. Radcliffe (a)*. In that case a testator gave land to his widow for life, and, if his son survived her, to him absolutely; but if he died in the lifetime of the wife (which event happened), then upon trust to sell and hold the proceeds upon certain trusts, under which the son took two thirds thereof. The son by his will affected to devise the land as real estate, and it was urged that his interest in the proceeds of sale was to be regarded as of that quality. But the Master of the Rolls, after pointing out that the will of the son was framed in the anticipation that he would survive the widow, continued thus:—

“The trust for conversion, on the death of the

(a) 23 Beavan, 163.

“ widow, was for the benefit of all the next of kin ; and
“ unless they all concurred in electing to take the pro-
“ perty as land, the trust took effect. It would be
“ repugnant to the principles on which the doctrines
“ of conversion and reconversion rest, to hold that one
“ of the legatees of an undivided share in the produce
“ of real estate directed by the testator to be converted
“ into personalty could, without the assent of the
“ others, elect to take his share as unconverted, and in
“ the shape of real estate.”

Next suppose the case to be that of a sum of money directed to be laid out on the purchase of land to be settled upon trusts under which, in the events which have happened, the land would belong as to one undivided moiety for A., and as to the other undivided moiety for B.

Here, if the land were actually purchased, A. and B. would each be at once entitled to compel a partition. Neither can it be said that either one or the other would be in the slightest degree benefited by insisting on a joint purchase. On the contrary, it is strongly to be expected that separate purchases would prove more beneficial to each than a joint purchase, subject to a right to partition. Under these circumstances, therefore, it is held that either A. or B. may elect to take his moiety of the money as money. For this I may refer you to the case of *Seeley v. Jago* (a).

There a testator devised that 1000*l.* should be laid out in purchase of lands in fee, to be settled upon A., B., and C., and their heirs *equally to be divided*.

(a) 1 Peere Williams, 389.

A. died, leaving an infant heir; and B. and C., together with the infant heir, filed a bill for 1000*l*. The judgement of Lord Chancellor Cowper is thus reported :—

“ The money being directed to be laid out in lands
 “ for A., B., and C., *equally* (which makes them tenants
 “ in common), and B. and C. electing to have their
 “ two-thirds in money, let it be paid to them; for it is
 “ in vain to lay out this money in land for B. and C.,
 “ when the next moment they may turn it into money;
 “ and equity, like nature, will do nothing in vain.
 “ But as to the share of the infant, that must be
 “ brought before the Master, and put out for the
 “ benefit of the infant, who, by reason of his infancy, is
 “ incapable of making an election. Besides, that such
 “ election might, were he to die during his infancy, be
 “ prejudicial to his heir.”

The next question which I shall consider is, whether a person who has an interest in the whole subject-matter, though of an expectant or deferred kind, can elect so as to effect a reconversion.

Thus, a sum of money is directed to be laid out upon land, to be settled to the use of A. for life, remainder to B. in fee. Can B., during A.'s lifetime, elect to take the money? Upon principle the answer ought, I conceive, to be in the negative. So long as A. lives, A. has a right to have the money laid out on land, and can at any time insist on that right. How can B., the remainderman, say, as against A., that the money to be laid out in land shall again become money,—shall be reconverted? The case differs from that before put

to you of tenants in common of proceeds of sale only in this circumstance, that it is not necessarily, or even presumably, for the interest of the tenant for life to insist on a purchase being made. In strictness, however, the remainderman has as little right, as against the tenant for life, to say that he will take the money instead of the land, as one tenant in common of the proceeds of sale of land has to say that he will take an undivided share of the land itself.

Upon the authorities, however, there is more difficulty. In the note of Messrs. White and Tudor to *Fletcher v. Ashburner* (a), to which I have already referred you, the general result of the cases upon this point is thus condensed :—

A remainderman may elect, but not so as to affect “ the interests of the owners of prior estates.”

Of course if it be meant by this that a remainderman may, as between his real and personal representatives, say that a particular reversionary interest to which he is entitled shall be treated as money or land, the proposition is indubitable. Even a tenant in common of proceeds of sale of land directed to be sold, may say *expressly* the proceeds shall be treated as land; but the question we are here discussing is, whether a remainderman can, by the mere exercise of his will, perform that act of election by which property is to be deemed as reconverted into its actual character?

In the case of *Triquet v. Thornton* (b), it certainly

(a) 1 Leading Cases in Equity, 685.

(b) 13 Vesey, 345.

was taken for granted he might, though the point was not argued. If the decision in *Triquet v. Thornton* on this point is to form our guide, the result seems to be that a remainderman may, during the lifetime of the tenant for life, by election reconvert the fund as between his heir and personal representatives.

But if this be so, this reconversion is, at all events, of a conditional or qualified kind only.

Thus, to revert to our former illustration (money articulated to be laid out upon land, to be settled upon A. for life, remainder to B. in fee). Now, according to *Triquet v. Thornton*, B. may, so long as the money has not actually been laid out, exercise an election to take it as money, subject to A.'s rights, and this exercise of election will be operative as between his real and personal representatives. But how if A., the tenant for life, should subsequently insist on the money being laid out on land? Then, I conceive, the effect of B.'s election must, at all events, be frustrated, and the land must go to his heir.

Such, I think, must be the view, even if the decision in *Triquet v. Thornton* is to prevail.

On the other hand, the observations of Lord Justice (then Vice-Chancellor) Knight Bruce, in the recent case of *Gillies v. Longlands* (a), seem to point to the stricter and sounder view, that so long as other rights intervene, the remainderman cannot elect—cannot reconvert—though, of course, no one could dispute his right expressly to regulate the devolution of any pro-

(a) 4 De Gex & Smale, 372.

perty as between his real and personal representatives (a).

There land was held upon trust, to pay the income to the separate use of a married woman for life, and after her decease upon trust for the children of herself and her husband, in terms giving them life interests only. The property was sold under a power of sale, and not reinvested in land. The wife had affected to treat the investment arising from the proceeds of sale as personal estate; and it was argued that her ulterior reversion, subject to the life interests, must be regarded as personal estate. But Lord Justice (then Vice-Chancellor) Knight Bruce, in delivering judgment, said,—

“ The husband died in 1835, and three children of
“ the marriage, and the wife, survived him; then the
“ wife died in 1845, and was survived by two children
“ of the marriage. There is no doubt but that at the
“ death of the husband the fund was impressed with
“ the character of real estate. After the husband’s
“ death the wife had no power of herself to change the
“ character of the property, because her children had
“ a right to a voice in the matter in respect of their
“ interests in remainder.”

The last point to which I shall call your attention is, as to the mode in which election may be made, or, in

(a) The judgement of Lord Westbury, in the case of *Sisson v. Giles*, 32 Law J. (N.S.) Chanc. 606; 3 De Gex J. & Smith, 614, points to the conclusion that, in order to effect a reconversion by the mere process of election, the party or parties electing must possess the entire absolute ownership in the subject matter to be reconverted.

other words, what will amount to an election to take the property in its actual state so as to effect a reconversion.

The very statement of the point implies that a positive declaration of intention is not requisite, for of course an express declaration of intention on the part of the owner of property that it shall be deemed either real or personal estate is "*per se*," sufficient to bind those claiming under him, without any reference to the actual state or condition of the property at the time.

Thus, take the case of land directed to be sold and the proceeds of sale paid to A. As to any personal estate, from whatever source arising, A. may, by express declaration, say that as between his real and personal representative, that personal estate shall be real estate; and so, therefore, he may of course do this as respects the proceeds of sale of this real estate.

But reconversion by means of election, which we are here considering, is an offshoot of the general doctrine that property (in the case put, the real estate directed to be sold) though in Equity of one quality, is in fact of another quality (in our particular instance, though in Equity personalty, is in fact realty). In this state of things it is held that if the absolute owner unequivocally shows his desire and intention to possess the property according to its actual state and condition, that shall amount to an election so to take the property, and operate a reconversion.

It results, therefore, that this election, this expres-

sion of desire and intention, may be inferred from any acts or writings of the absolute owner. Moreover it is not necessary that an intention to *reconvert* should appear, it is quite sufficient if an intention existed to take the property in its actual state.

Thus in *Harcourt v. Seymour* (a), where the question was, whether Lord *Harcourt* had by his acts reconverted into money a sum of 32,000*l.*, held upon trust to be laid out on land, Vice-Chancellor Kindersley thus expresses himself:—

“It was argued, indeed, by Mr. Rolt, that there
“ must be an intention strictly to convert; that is to
“ say, that, knowing that the money was impressed
“ with the character of land, the party must say: ‘I
“ ‘mean that it shall no longer be land, but it shall be
“ ‘in its actual form of money.’ I do not, however,
“ think that that is the correct view of the law. It is
“ quite sufficient if the Court sees that the party
“ means it to be taken in the state in which it actually
“ is. Whether he did or did not know that, but for
“ some election by him, it would be turned into land,
“ is quite immaterial. If, being money, the party
“ absolutely entitled, indicated that he wished to deal
“ with it as money, and that it should be considered
“ as money, whether he knew or did not know that,
“ but for that wish, it would have gone as land, ap-
“ pears to me to be wholly immaterial.”

Upon the question what acts will be sufficient to indicate an election, it is difficult to lay down any distinct rule. Perhaps the best general statement is

(a) 2 Simons (N.S.), 12, 46.

that given by Lord Cottenham in the case of *Cookson v. Cookson* (a), in the following words :—

“ All the cases establish this, that where the conversion has not, in fact, taken place, and the interest vests absolutely, whether in land or money, in one person, any act of his indicating an option in which character he takes or disposes of it, will determine the succession as between his real and personal representatives.”

I will, however, mention some of the acts which have occasionally been more particularly relied upon as indicating an intention to elect.

Take, first, the case of real estate directed to be sold.

Entry upon the land and receiving the rents and profits has generally been viewed, and justly so, as affording a strong indication of intention to elect; and though in one case (b) Sir William Grant seems to have considered that an entry for two years was too short time to amount to an election, the authority of that decision is open to considerable doubt.

So the circumstance of granting leases reserving rent to the party entitled, his heirs or assigns, would afford a strong indication of election (c).

So any acts showing an intention to treat the trust as at an end.

In *Davies v. Ashford* (d), by a marriage-settlement,

(a) 12 Clark & Finnelly, 146.

(b) *Kirkman v. Miles*, 13 Vesey, 338.

(c) *Crabtree v. Bramble*, 3 Atkyns, 680.

(d) 15 Simons, 42.

real estates were conveyed to trustees in trust to sell and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely. There was no child of the marriage, and the husband survived his wife, and after her death consulted his solicitors upon his rights under the settlement, and they having advised him that he was entitled to the whole beneficial interest in the estates, he got possession of the settlement, and of the title deeds, and remained in possession of them, and also of the estates, until his death. It was held that he had, by these acts, sufficiently declared his election to take the estates as land.

The late Vice-Chancellor of England in delivering judgement, said :—

“ I admit that the settlement contained a clear
“ trust for sale, which must have been exercised
“ unless Mr. Davies did some act which showed that
“ he meant the trust to be at an end, and to take
“ the estates as land.

“ It does not distinctly appear in whose custody the
“ title deeds originally were ; but it is clear that there
“ was a change in the possession of them, and that
“ Mr. Davies got them into his custody. Now was
“ not that of necessity a destruction of the trust ? For
“ the trustees could not have compelled Mr. Davies
“ to deliver up the deeds ; and, without doing so, they
“ could not have made any effectual sale of the estates.
“ Therefore, it seems to me that, by consulting on his
“ rights under the settlement, and then taking the

“ deeds into his possession (from whom or by what means he obtained them is immaterial), he made a clear election to take the estates as land.”

Next, as regards personal estate to be laid out on land. Of course, if the person entitled receives the money or securities, the trust is at an end—the reconversion is perfect. But acts short of reduction of the fund into possession will suffice.

Thus, in *Cookson v. Cookson* (a), already referred to, the question, whether a sum of 10,000*l.*, which for the purposes of the decision was treated as being impressed with the character of real estate, had, in fact, been reconverted, was decided in favour of the reconversion upon the strength of certain recitals contained in a deed executed by the tenant for life and remainderman of the money-land. And in *Harcourt v. Seymour* (b), also before referred to, a reconversion into money was, upon the result of various dealings, held to have been effected by Lord *Harcourt*, he being tenant for life of the money-land there in question, with remainder (subject to intermediate remainders which failed on his death without issue) to himself in fee.

In concluding, as I am now compelled, my sketch of the doctrine of conversion, let me earnestly recommend to your attention the further pursuit of the subject, not only as being one of the most interesting that the range of our Equity reading presents, but on the further ground that the doctrine itself is firmly founded on sound reasoning, and approved by every consideration

(a) 12 Clark & Finnelly, 147.

(b) 2 Simons (N.S.) 12.

of good sense. I believe I may say, without fear of contradiction, that while the doctrines of "election" and "satisfaction" have (and as it seems to me not without just cause) been the subjects of repeated comment and doubt, that of "conversion" has deservedly escaped all hostile criticism.

FUSION.

BEFORE addressing myself to the subject of my lecture I desire to say that I aim at nothing higher than to explain, in a mode suited to the legal knowledge of the more advanced students present, the general aspects of a question (or rather of a portion of a question) of considerable difficulty, to which the attention of many able men is now directed, and commonly known as that of "Fusion."

Let me add that wherever I may stray from the path of "elementary explanation" and hazard any expressions of opinion as to the feasibility or expediency, or otherwise, of any particular course of action, the views enunciated by me must be regarded as purely my own, and not as being approved (or, indeed, disapproved) by the Council of the Society, by whose desire I this evening address you.

In discussing the question of "Fusion," I propose adopting the following order. I shall consider:—

First,—The actual condition of things, and the inconveniences attributable to the twofold system of Law and Equity.

Secondly.—Any remedies short of Fusion that may suggest themselves for these inconveniences ; and,

Thirdly.—The work requisite to be done to effect Fusion.

I.—Now as respects the actual condition of things, it may be stated generally that we have two sets of Courts, distinguished as those of Law and Equity (*a*).

The former, known as the Common Law Courts, are mainly concerned with questions arising simply between A. and B., or, at all events, simply litigated between them, A. complaining that B. has broken some contract entered into with him, or has done him some wrong, and asking for pecuniary reparation. In short, the thing complained of is either breach of contract or tort, and the remedy sought at the hands of the Common Law Court is, in either case, damages.

The other set of Courts, commonly known as Courts of Equity, take cognizance of and adjudicate upon vast classes of rights which for the Common Law Courts are, so to speak, invisible and non-existent, as more particularly those arising out of instruments of trust, or connected with the distribution of estates of testators and intestates, or with mortgages—all those rights, in short, in the enforcement of which the Equity Courts are said to exercise an exclusive jurisdiction.

The Equity Courts also, in certain cases in which

(*a*) For the sake of simplicity all reference to the Court of Admiralty was omitted.

the Common Law Courts afford practically no other redress than that of giving damages, supply to the party grieved a better remedy; as in contracts for sale of land by decreeing specific performance, or in cases of infringement of patent, copyright, or trade mark, nuisance of every description, and waste, by awarding an injunction to restrain the wrongdoer from committing the tort complained of. And in these cases in which the Equity Courts thus interfere to afford a better remedy, they are commonly said to exercise a concurrent jurisdiction.

The Equity Courts used also (and their jurisdiction in this respect is occasionally invoked even now) to act in aid of the Common Law Courts, more particularly by compelling discovery, and this head of jurisdiction is commonly referred to as “auxiliary.”

If we add that the two sets of Courts have different systems of procedure generally; that the course of pleading is different in each; that while in the Common Law Courts the judges decide the law and a jury the facts, in the Equity Courts the judge decides facts as well as law; and that in the Common Law Courts the evidence is taken *vivâ voce* in open Court, while in Equity the evidence is for the most part in writing, by affidavit or deposition—we have a rough sketch of “the general condition of things,” which sketch, however, would require many qualifications to produce complete accuracy.

The disadvantages of this twofold system may be summed up generally under the phrase “more Courts than one for one subject matter of litiga-

tion," or, if I may borrow a metaphor from a homely proverb, the judicial broth is the product of too many cooks.

For the purpose of illustration I will lay out of account, in the first instance, the remedial legislation of the last twenty years.

Of course in cases falling rigorously under any head of exclusive Equity jurisdiction there could be no double litigation.

It would be incorrect, no doubt, to say that double litigation was altogether absent from the heads of Equity which I classed just now amongst those of exclusive jurisdiction. Thus in a suit to administer a testator's estate, it was a common course for the Court of Equity to direct a person claiming to be a creditor, and respecting the validity of whose claim there might be a doubt, to establish his debt by bringing an action at law. But the explanation here is that although administration and distribution of testators' estates is, speaking generally, a head of exclusive jurisdiction, it is, *in so far as respects the satisfaction of a creditor's claim*, one in which the primary remedy of the creditor is by action at law—in other words, the jurisdiction was, and still is, in this respect, concurrent.

Apart, however, from exceptions such as that just alluded to, it was under some or one of the classes of cases ranged under the heads of concurrent and auxiliary jurisdiction that the evils of double litigation were (as they still are) felt.

Chief among these may be mentioned injunction cases, where a plaintiff came to a Court of Equity pray-

ing an injunction in aid of his legal title, asking, say in a copyright case, an injunction to restrain infringement, and an account of the profits made by the infringer, and in which the Court, before granting equitable relief, ordered the plaintiff, as of course, to bring an action at law to establish his legal title.

As respects that branch of the auxiliary jurisdiction commonly termed ancillary, double litigation was not merely an occasional, but a necessary concomitant. The Court of Equity pretended to be no more than the handmaid of the Court of Law, and under this head it may suffice to refer to the fact that formerly a plaintiff or defendant at law could obtain no discovery in aid either of his action or of his defence, except by filing a Bill in Equity and paying the whole costs of the suit, whether ultimately successful or not at law.

In the instances of evils which I have mentioned, I have been referring to things as they were until within the last few years. Under the amending hand of legislation those evils have almost disappeared.

The claim of a creditor, as indeed any other legal claim in a Court of Equity, is now adjudicated on by the Court.

In injunction cases where an injunction is sought in protection of a legal title, say a case of patent right, copyright, trade mark, or private nuisance, the Court of Equity itself decides the question of legal right, and the jurisdiction, formerly auxiliary only, has now become in effect concurrent.

In cases where discovery is needed in aid of an action, or of a defence to an action, at law, discovery by means

of interrogatories and production of documents is obtained at law.

These results have been reached mainly by the Act known as Rolt's Act, under which the Equity Courts are bound to decide legal questions arising in matters falling properly within their cognizance, and by conferring on the common law powers of enforcing discovery, and of compelling production of documents.

Still, although to a great extent the desired object of "one Court for one cause" has been attained, instances of inconvenience remain, and are of sufficient frequent occurrence to call for amendment.

Thus, for instance, in certain cases where a plaintiff has filed a Bill to restrain a private nuisance, say obstruction to his light and air, and the circumstances have been such as to lead the Court of Equity to the conclusion that it ought not to interfere by injunction, it has dismissed the Bill, and while refusing to award damages under Lord Cairns' Act, has yet dismissed the Bill without prejudice to an action, thus leaving the parties to renew the litigation at law (a).

A case partly of this description (though somewhat special in its circumstances), *Gaunt v. Fynney* (b), occurred recently on appeal to the present Chancellor, who delivered judgment on the 14th inst. There the plaintiffs prayed an injunction and damages in respect of three distinct matters: first, nuisance from noise and vibration of a steam engine; secondly, encroachment on the foundation and walls of a stable; and

(a) See *Durell v. Pritchard*, L. R. 1 Ch. 244.

(b) *Times Newspaper*, Nov. 15, 1872.

thirdly, obstruction of an ancient stable window. The case came in the first instance before the Master of the Rolls, who refused to grant an injunction, but directed an enquiry as to damages. Upon appeal the Lord Chancellor came to the conclusion that no injunction ought to be awarded in respect of the alleged nuisance by noise and vibration; that as respects the alleged encroachment the question was one of ejectment to be tried at law; and that as the question of encroachment must be remitted to the decision of a Common Law Court, the question of obstruction of the ancient light would be more conveniently tried there also, and he consequently dismissed the bill with costs, but without prejudice to any action which the plaintiffs might be advised to bring at law.

So again in a case of *Hoare v. Bremridge* (a), which came very recently before the full Court of Appeal, in which an insurance company a few months after the death of an assured filed a bill praying that the policy of assurance might be declared void on the ground of fraud, and five weeks or so later the executor of the person insured brought an action at law against the company to recover the amount insured by the policy, Vice-Chancellor Malins in the first instance, and the full court on appeal, refused to restrain the action (though brought after bill filed), considering that the question would be more conveniently tried at common law before a jury.

The struggle between the parties in this last case probably, or possibly, arose from the circumstance that the

(a) See Weekly Notes of Nov. 16, 1872.

Company in the first instance may have wished to obtain the benefit of the more effective discovery afforded by the Equity procedure, and afterwards struggled to retain the jurisdiction in Equity, considering that a judge would be less prejudiced than a jury in favour of the policy-holder, and possibly also that some portion of the unpopularity commonly attaching to an insurance company which disputes a doubtful claim might be escaped by a trial in Equity, always less noticed by the public than one before a jury at *Nisi Prius*.

On the other hand the executor of the assured may have wished to obtain the benefit of what may be called "jury prejudice" and dislike for publicity on the part of the Company.

However this may be, and whether these surmises be correct or not, the result was that both the action and the suit were left to go on, and they are both proceeding at this moment; and though the action will in all probability be tried before the suit can be heard, and the suit thus be rendered nugatory, yet there may be a rule for a new trial or other proceedings at law by means of which the ultimate decision in the action may be delayed until long after the suit is ripe for hearing.

Then again, although, as a rule, the purely ancillary jurisdiction of the Courts of Equity is no longer invoked, and plaintiffs and defendants at law are content with such discovery as they can obtain under the Common Law Procedure Acts, there can be no doubt that the cautious (not to say timid) exercise by the Common Law Courts of the engine of discovery placed in their

hands renders it still for the advantage of a Common Law litigant to come as plaintiff to a Court of Equity for discovery, provided only the stakes are sufficiently large to warrant his incurring the burden of the whole costs in Equity.

Very recently a bill for discovery in aid of proceedings in ejectment was filed in Chancery (*Browne v. Wales*), the object of which was to compel the defendants, who (it was alleged) had obtained possession of certain houses as under-lessees, to produce their under-leases, the plaintiff alleging that the houses in question formed in fact part of property comprised in a term for ninety-nine years, created in 1763 and now expired, and that upon the under-leases being produced the houses would be identified as forming part of the property. The bill was demurred to, and the demurrer over-ruled by Vice-Chancellor Wickens (a).

The ultimate result of the litigation is, of course, still uncertain, but for my present purpose it is sufficient to point out that the title to the houses must be decided at law in an action of ejectment, and as the plaintiff in Equity (whether he be right or wrong in his general litigation) must pay the costs of the suit in Equity, it cannot be said that all inconvenience, even under this head of ancillary jurisdiction, has altogether disappeared.

When I add that each of the three foregoing illustrations is derived from the actual course of litigation in the Chancery Courts during the past Michaelmas Term, it will be difficult to resist the conclusion that

(a) Weekly Notes for Nov. 23, 1872.

the existing state of things is not satisfactory, and that the evils which still prevail are far from infrequent in practice.

It may perhaps be suggested that these evils are not the necessary product of the twofold system, but a little consideration will show that so long as Law and Equity are kept apart and administered by different Courts with different systems of procedure, one of two inconveniences is inevitable.

If, tolerating no concurrence of jurisdiction, it be attempted to define sharply and distinctly what classes of cases shall belong to the Equity jurisdiction and what to that at Law, there will be always danger of a litigant seeking his remedy in the wrong Court, and so being, according to the cant phrase, bandied from court to court.

If, on the other hand, you allow any concurrence of jurisdiction and at the same time tolerate any material difference in procedure or mode of trial, some element of advantage, real or supposed, arising out of difference of procedure will (occasionally at all events) produce a struggle on the part of one or other of the litigants to invoke in preference the jurisdiction of one or other of the Courts.

The first species of inconvenience thus arising will be of the kind well illustrated by *Wright v. Lord Maidstone* (a), in which a bill to obtain relief in respect of a destroyed bill of exchange was met successfully by demurrer, on the ground that although there is jurisdiction in equity to afford relief where a bill of ex-

(a) 1 Kay & Johnson, 701.

change has been “*lost*,” there is none where a bill of exchange has been “*destroyed*.”

And if it be said that no such glaring instance of mistaken resort to the wrong Court could occur if the respective domains of legal and equitable jurisdiction were carefully defined, the answer is, that cases like *Gaunt v. Fynney* would at least occur in which questions legal and equitable would be found to be so mixed up that the aid of more Courts than one would be needed, or at all events invoked, for the complete decision of matters of difference which ought to be dealt with as one single dispute.

The second species of inconvenience has been already illustrated by both *Hoare v. Bremridge* and *Browne v. Wales*.

Considering the necessary cost to the plaintiff of his proceedings in the latter case, it would be difficult to adduce a more apt instance of the general proposition that if there be difference of procedure, one or other party will occasionally be a gainer by invoking one jurisdiction rather than the other, and will, when the occasion arises, do so.

As respects *Hoare v. Bremridge*, I have, in my previous mention of that case, glanced at the motives which may have induced the struggle to support one jurisdiction rather than the other. Nor would it be difficult to suggest other circumstances which might render success in retaining or shifting the jurisdiction of considerable importance to a litigant.

The mere difference in the mode of taking evidence may occasionally be the cause of such a struggle.

The solicitor on one side may know or feel morally convinced that his principal witness in the cause will make what is commonly called a "bad witness"; that although he may be honest and veracious, and fully capable of affording the materials for a truthful affidavit, yet, when put in the box at *Nisi Prius* he will damage the case, or, at least, weaken the weight of his evidence, and THAT because he is timid, or hot tempered, or dull, or at least deficient in quick perception.

In such circumstances the solicitor will naturally endeavour to obtain a trial by the Court of Chancery rather than at Common Law, since in the former case the witness will make a clear good affidavit, and the opposite side may not choose to run the risk of cross-examination.

Summing up shortly: If the respective jurisdictions are made wholly exclusive, the difficulty of definition has to be met; if made wholly (as they are now partially) concurrent, and the procedures are different, there will be a struggle between the suitors to invoke one jurisdiction rather than the other.

I must not of course be understood as suggesting that all the double litigation which now arises is the product of the double system.

Double litigation at law alone is frequent enough. There are a large mass of cases occurring in the Common Law Courts in which a defendant who has a counter-claim against the person suing him has (though such counter-claim may be closely connected with the subject matter of the action brought against

himself) no remedy except by way of independent cross action. One of the great defects of the Common Law system has been the lack of machinery for bringing to a single decision claims and counter-claims which, though perhaps upon a strict technical view distinct, ought in the interest of substantial justice to be adjudicated on together.

The point intended to be insisted on is that there is a large amount of double litigation occasioned by the double system, and that as respects this litigation difference of procedure or remedy, or of what I may call machinery for the administration of justice, will in general be found to be the cause underlying the double litigation at Law and in Equity.

That plurality of Courts and concurrence of jurisdiction will not, *without something more*, produce the kind of inconveniences arising from the double system, is sufficiently proved by the fact that we have at Common Law three separate Courts, each possessing an independent concurrent jurisdiction in ordinary civil matters, and yet no substantial inconveniences arise from their separate and concurrent jurisdiction, a fact for which it is difficult to assign a satisfactory reason other than that the principles, procedure, and machinery of the three Courts are the same.

Let me illustrate by example the difference between the operation and remediability of double litigation where the principles and procedure of the Courts are similar and where they are different.

There are, as I intimated, many cases in the Common Law Courts where the counter-claims of a defendant are

not available by way of defence, but where his remedy is by cross action.

Thus in former days, where a vendor had sold a specific article for a fixed sum, with warranty, and he sued for the price, it was held that the purchaser could not, by way of defence, give in evidence the unfitness of the article for the purpose for which it was sold. He was obliged to bring a cross action for breach of warranty. But the evil in this case was in no way caused by or connected with the existence of more Common Law Courts than one. It would have been just the same, neither greater nor less, had only one Common Law Court instead of three existed.

Subsequently a more liberal view was taken by the Common Law Courts as respects the point just mentioned, and it was established (you will find the whole history of the change discussed in *Mondel v. Steel*, 8 Meeson & Welsby, 858), that though if the defendant sought to recover consequential damages arising from the article proving unfit he must proceed by cross action, he might, by way of defence, claim to reduce the amount for which he was liable by the difference between the actual value of the guaranteed article, and its true value at the time of delivery.

The result of this change was at once, *to the extent of the alteration in the law*, to render any cross action unnecessary.

Let us compare this with an analogous case, where the jurisdiction is partly at Law and partly in Equity.

Thus, assume A. and B. to have been in partnership ; that the partnership accounts are still unsettled ; that

A. holds B.'s bond in respect of matters connected with the partnership, and that disputes arise.

Here A., instead of filing a bill to have the partnership accounts taken, will almost certainly bring an action on the bond, and B.'s only remedy (there being no machinery for taking partnership accounts at law) is to file a bill to restrain the action, and have the accounts taken in equity.

Suppose now that it is desired by a more liberal extension of what I will venture to call somewhat loosely and inaccurately the law of "Set-off or Compensation," to make the unsettled accounts available, by way of defence at law.

Without altering the double system as now existing this cannot be done. The attempt has been made and has failed.

It was at one time supposed that the action on the bond might under the modern legislation be met by an equitable plea, but it soon became apparent that it could not.

B.'s defence is in effect, "I claim to have the partnership accounts taken." But the Common Law Courts have, as they now stand, neither jurisdiction nor machinery for taking partnership accounts.

Therefore the case is not suitable for a defence by equitable plea, and accordingly the evil of double litigation must, in such a case, continue, save as partially remedied by the Court of Equity restraining the action and taking the whole matter into its cognizance.

The result must be the same in all cases where the special machinery or procedure or remedies of the

Courts of Equity are or may be needed to effect complete justice.

The specific performance of contracts as enforced by Courts of Equity, constitutes a standing and permanent instance of double litigation arising from difference of remedy.

Thus a purchaser who has paid a deposit and considers that he is not bound by the contract, has no remedy save to bring an action at law for his deposit, a step which is commonly at once met by the vendor filing a bill for specific performance, praying an injunction to stay the action, which injunction is granted almost as of course upon the deposit being brought into Court.

Double litigation in cases of this sort is the normal state of things.

The conclusion under the first head of my subject must therefore be that the existing state of things is attended with grave inconveniences, attributable to the twofold system of Courts and of jurisprudence as at present existing, and that difference of procedure or remedy in the distinct Courts lies at the root of the evil.

II.—Under the second division of my subject I proceed to consider whether any remedy for these inconveniences short of an actual fusion of the Courts and systems can be suggested.

It might be supposed that the evils might be removed by giving to each Court complete jurisdiction in all matters legal and equitable, leaving untouched

the distinctive principles, procedure, and practice of each system.

This state of things actually now exists as respects the County Courts, the judges of which, within the limits of their jurisdictions, administer equity as well as law, and are competent to entertain an action at law or plaint in equity by A. against B., and a cross action or cross plaint by B. against A.

If any such remedy were resorted to, it would be a *sine qua non* that each and every Court should renounce all pretension to restrain a litigant from proceeding in another Court, since otherwise Common Law actions brought in one Court might still be restrained by Equity suits instituted in another, thus keeping alive the evils of litigation in more Courts than one.

The general working of any such general communication of both jurisdictions to all the Courts would presumably be that Equity suits would in general be still instituted in the Equity Courts, and Common Law actions in general be still brought in the Common Law Courts; and where now the real defence to a Common Law action is by Equity suit, the suit would necessarily be instituted in the Common Law Court in which the action is pending.

Special provisions would of course be needed to provide for the contingency of an Equity suit in one Court being met by a cross action at law in another.

It is noteworthy that in answer to one of the questions addressed by the Judicature Commissioners to the County Court Judges, by which the latter were

in effect asked whether, in their opinion, any inconveniences resulted from administering justice in the County Courts upon different systems (*a*), replies in the negative were received from a very large majority of Judges. Some of the County Court Judges even went so far as to treat the difference of procedure as an advantage.

It is, however, difficult to believe that if the Chancery and Common Law Courts were each and all invested with jurisdiction in all matters legal and equitable, with two distinct procedures, and almost as of necessity, two distinct sets of officials in each Court, the result could be anything but an interregnum, during which no doubt the Judges of the Common Law would learn something of Equity doctrines and procedure, and the Equity Judges become partially acquainted with those of the Common Law—but still an interregnum of confusion tolerable only as leading necessarily to something better than the present state of things.

But further, it may perhaps be suggested that an adequate remedy would be provided if, while retaining the present double system, the various heads of litigation were distributed between the existing Courts of Law and Equity, according to some well considered scheme; no concurrent jurisdiction, however, being tolerated, and the Equity Courts being deprived of all right to stay by injunction proceedings at Common Law.

(*a*) The question, in fact, extended to the Admiralty as well as to the Common Law and equitable jurisdictions. But see note *ante*, p. 435.

The nearest approach to any satisfactory distribution would perhaps be to allot to the Chancery Courts, in addition to their present large administrative business, all matters connected with the construction of deeds and wills, and all matters of account, and to reserve for the Common Law Courts the purely litigious business in which *vivâ voce* evidence is of so much importance.

The subject is too large to admit of more than this cursory reference, but a very moderate amount of consideration will, I think, be sufficient to satisfy any one who has studied the question, that any such remedy as last suggested would draw with it more difficulty than even general codification of the law, and would lead only to an unsatisfactory result.

It may be added, in connection with this subject, that if it be considered of importance to retain for particular heads of jurisdiction the Equity procedure, and for others that which now prevails at Common Law, this can be far more conveniently done by means of the internal arrangements (flexible and admitting of ready change,) of a single United Judicature, than by preserving the judicatures distinct and distributing the business by statute.

If, then, we can neither give to each and every Court complete jurisdiction in all matters legal and equitable, nor distribute amongst the various Courts the legal work to be done, so as to give to each Court, exclusively of all others, its suitable share of jurisdiction, the only remedy seems to be to attempt to blend the Courts and systems into one whole, in a word

“*Fusion*”—which brings me to the third division of my subject, viz., the work requisite to effect fusion.

III.—Here for lack of time I am compelled to omit all reference to the various administrative questions which surround a task such as that of consolidating the ancient Courts of England into one Court, and I shall, assuming such a consolidation to be feasible, direct my attention to the problem of effecting a fusion of the jurisprudence, procedure, and practice of the two systems, Law and Equity.

Now in order to determine how this “Fusion” is to be effected, it seems essential to consider previously the differences between the two systems, because if the two are to be blended this must be by adopting wholly or in part what exists in one or the other system, save so far as it may be found desirable to supersede both by something new.

The differences may be classed under the following heads:—

1. Difference as respects principles of jurisprudence.
2. Difference as respects pleading.
3. Difference as respects trial in relation to the functions and powers of the judge.
4. Difference as respects mode of taking evidence.
5. Difference as respects locality of trial.

Taking these differences in the order just mentioned, the first difference to be noted between Law and Equity is that actually subsisting in the jurisprudence of each. Equity acknowledges rights wholly

ignored by the Common Law, and, in many instances, qualifies and varies those which the Common Law recognizes.

If the existing aggregate of our jurisprudence, legal and equitable, as distinguished from its administration by means of different Courts, be in the main just and satisfactory (and small complaint is heard on this head) the result is that fusion of the two systems in respect of jurisprudence must be accomplished by providing in effect that our law shall consist of all law, save as qualified by equity, *plus* all equity. In other words, Equity must be added to Law, and supersede it where it differs.

The next question is, how this process is to be effected.

By the High Court of Justice Bill, carried through the House of Lords by Lord Hatherley in 1870, but withdrawn late in the Session, after reaching the House of Commons, it was proposed, while providing for a fusion of the Courts into one High Court of Justice, to effect the fusion of the two systems of jurisprudence by an enactment which had Lord Westbury for its author, and which by amendment took the place of a shorter and less accurate provision of a similar description. It was contained in section 12 of the Bill, as it finally passed the House of Lords, and was as follows :—

“Equity, or the rules and principles which govern
“the Court of Chancery in the administration of
“justice, shall henceforth be blended and united with
“the common law of England and (so far as there is

“ any difference) shall control and modify the same
“ and supply the defects thereof, to the intent that
“ henceforth there may be no division in the juris-
“ diction of the several Courts, but that equity and
“ common law, so united as aforesaid, may be ad-
“ ministered in all the aforesaid Courts without
“ difference or distinction, and in case of any conflict
“ of jurisdiction the jurisdiction which has hitherto
“ been exercised by the Court of Chancery, or by
“ the Court of Admiralty, shall prevail from time
“ to time.”

There can be no doubt, I think, that an enactment to the effect of that just read would effectually fuse the principles of Law and Equity, but it is another and distinct question whether it would be the best and most suitable way of bringing about that fusion.

In the letter addressed by the Lord Chief Justice of England to the late Lord Chancellor while the Bill was in progress, a resolution, adopted by sixteen out of seventeen Common Law Judges, was communicated, which resolution was as follows :—

“ That it appears to the Judges that while it is
“ highly desirable that the distinction between Law
“ and Equity now existing in respect of civil rights
“ shall be done away with, and that in civil suits and
“ actions one law shall be administered, it is essen-
“ tially necessary, in order to prevent confusion in the
“ administration of justice, that instead of a general
“ enactment such as is now contained in clause 13 of
“ the High Court of Justice Bill, a careful collation

“ of the Common Law and Equity law having been
“ first made, express provision shall be made as to
“ what the law shall be in each particular instance;
“ or, if this course should be deemed impracticable,
“ owing to the time it would require, that clauses
“ should be carefully framed, expressly stating the
“ principles determined on by Parliament for the
“ purpose in view.”

The general enactment referred to by the judges was not the one which I have just read, but a shorter and less precise provision, for which that penned by Lord Westbury was subsequently substituted, but the views of the judges are here distinctly expressed in favour of codification, or, at all events, of a partial ascertainment of the principles on which Fusion is to take place.

Whether they would have considered the clause which I have read as sufficient may be doubtful, but the Bill of 1870 must, I think, be regarded as having failed, not so much because it made no provision for codification generally, as because it made no provision even for the procedure and practice of the proposed High Court, and committed the future establishment of the necessary provisions under those heads, not to the judges of the proposed High Court of Justice itself, but to the Queen in Council in the first instance, and afterwards to the Queen with the advice of the Lord Chancellor alone.

It is impossible not to feel that a general Code, if not absolutely necessary, would at all events be of immense assistance in carrying out the work of fusion,

more especially to the Common Law Judges, who would be called upon after fusion to administer blended Law and Equity upon equitable principles (*a*).

Those, however, who desire fusion strongly will probably be disposed to prefer the general course of enacting that fusion *shall be*, leaving it to the judges of Law and Equity to determine (with or without suitable special assistance) *how*; instead of deferring legislation until a Code can be produced (*b*) deserving acceptance by the Legislature.

Assuming, however, a Code to be dispensed with, the observations which I am about to make on the other points of difference between the systems of Law and Equity will, I think, sufficiently show that at least the general principles of the procedure and practice to be adopted by the fused Courts should be ascertained, since those differences are so great that if the whole matter be referred (without any rule or guide) to the mingled legal and equitable judicial elements whereof the blended Court of Justice will be composed, there may be danger of vital disagreement.

(*a*) It is obvious that, if only for the purpose of assisting a judge in dealing with legal questions hitherto unfamiliar to him, say a Common Law judge with a question of right to tack incumbrances (if such a right were suffered to survive codification), or an Equity judge with a question of constructive total loss, codification would be of immense advantage; but the cases intended to be referred to are those in which the Common Law would have to be regarded first as existent, and then as being overlapped and modified by equitable jurisdiction.

(*b*) There seems just at present to be a reaction in legal opinion, and a tendency to underrate the difficulties of codification. The defects and imperfections of the French Code, arising partly from vice in the original plan, and partly from hasty and imperfect execution, should not be forgotten.

I proceed now to the second of the differences referred to—differences as respects pleading.

Besides differing in jurisprudence, Common Law and Equity differ in their system of pleading.

Equity pleadings contain little more than the statements and counter-statements of the plaintiff and defendant, couched in language free from technicality.

Common Law pleadings, on the other hand, being merely machinery for the production of issues, aim at conveying in concise technical language the legal effect of, or the resulting or complex fact equivalent to, the detailed facts on which the litigant relies for his attack or defence.

Hence the artificial and often the apparently contradictory character of the pleadings. A pleader settling pleadings for a defendant collects from his instructions that the facts will probably support a plea of non-assumpsit, and he so pleads, and at the same time considering that the facts may support a plea of legal tender, he pleads also tender.

The issues ultimately arrived at, though commonly called issues of fact, are far from being so.

The so-called facts alleged on one side and denied on the other are legal results.

The real facts are kept out of sight, and remain, so to speak, in the dark, until brought to light on the trial. It has to be ascertained by trial at Nisi Prius, whether, for instance, the facts there proved by the defendant, taken in conjunction with those proved by the plaintiff, do or not establish, say, a plea of tender.

The judge says to the jury, "If you believe such and such witnesses, the plea of tender is proved, and you will find on that issue for the defendant. If not, you find on that issue for the plaintiff."

Nothing can well be more artificial, for after verdict nothing remains on the record to show what facts the jury, who are judges of fact, really considered to be proved. Their verdict is the conjoint result of the law as laid down by the Judge, and of their own views respecting the actual facts proved before them.

Upon this conflict of methods the question at once arises :—If Common Law and Equity be fused, which shall be adopted? To this, I believe, there can be but one answer. As between the artificial system, invented merely for the production of issues, and the natural system of allowing each party to state his own case, the latter must prevail.

Not that the adoption of the latter system is free from risk, and more especially the risk of prolixity.

In some able observations on the Reports of the Judicature Commissioners made by a well-known County Court Judge, a kind of pleading *Millennium* is anticipated. We are told to hope for "a simple intelligible statement of the plaintiff's claim, and a like simple intelligible statement of the defendant's answer, each sufficient without prolixity, brief without obscurity, accurate without needless technicality, precise without needless formality."

I wish I could feel equally sanguine. So long as thought and language exist, to be brief without obscurity will be attained only by a gifted few. The

rest will, as Horace tells us he did, become obscure in labouring to be brief.

Still as between the artificial Common Law system and that of Equity, the latter must, I conceive, in the main prevail.

But, in addition to differences of jurisprudence and differences of pleading, there remain the differences between Common Law and Equity adverted to under my 3rd and 4th heads in the mode of trial and of taking evidence.

They may be thus stated:—

At Common Law questions of fact are^e determined by a jury. In Equity by the judge.

At Common Law evidence is taken *vivā voce* in open Court; whereas in Equity the evidence is commonly by affidavit, with an occasional resort to *vivā voce* evidence.

In these differences appear to me to lie the most substantial difficulties in the way of fusion—difficulties arising partly from conflict of opinion amongst men of high legal position, and partly from the undoubted fact that the question, what is the most convenient mode of trial and of taking evidence, cannot be answered simply and absolutely, but only by reference to the nature of the litigation.

Upon the value of trial by jury in civil causes very conflicting opinions exist. People are now heard to say boldly that juries might be very necessary in times when judges were corrupt, but that it is ludicrous to sit by at a trial at Nisi Prius and see a judge carefully sift and weigh the evidence which has been given, and

then remit the decision to a jury who are not competent to sift and weigh without his assistance.

Upon the question of mode of taking evidence there is far less difference of opinion.

The preponderance is strongly in favour of *vivâ voce* evidence given in presence of the persons or person by whom the questions of fact are to be decided.

Reasoning upon theory only, there would not be a word to be said in favour of any other mode of taking evidence.

The general proposition must however receive considerable qualification when considered in connection with actual practice.

In a typical Common Law case, say a running-down case, where the sole question is—was the hansom cab or the omnibus in the wrong?—nothing is of any value save *vivâ voce* evidence thoroughly sifted. Of the witnesses some may be stupid and honest, some dishonest yet acute; but there are no other means of reaching the facts, no landmarks to assist.

On the other hand, after laying out of consideration the large number of cases dealt with by the Court of Chancery (such as construction of wills and deeds, foreclosure, redemption, specific performance, &c., &c.) in which *vivâ voce* evidence is hardly ever needed at all, there remains a residuum of cases in a substantial proportion of which it is needed but little, or at all events is of comparatively small importance.

Take the case, for instance, of a bill to set aside a deed as having been obtained by fraud, perhaps eight or ten years previously. The parol evidence to be

given on the subject by one or other of the parties interested is often of the minutest possible value. After the lapse of time the memory is imperfect, the bias or interest strong, and the correct decision of such cases will commonly be found to depend ultimately upon the letters and written documents which are forthcoming. It is not too much to say that in a case of this sort a single clear incontrovertible inference derivable from contemporaneous written documents of undisputed authenticity, must carry more weight with a judge than any amount of the hardest swearing, whether by affidavit or *vivâ voce*, with or without cross examination.

The parol evidence in such a case is often what is least important.

The next observation to be made is, that it would seem desirable, *so far as practicable consistently with other objects*, that the trial of a cause should be single and complete, as to law and fact, at the same time.

Much has been said, and justly so, as to the absurdity of deciding questions of disputed fact upon affidavits and written depositions, but the counter-vailing disadvantages of the Common Law system, which, in cases involving complicated questions of law as well as of fact, works by means of a double or piecemeal trial partly at Nisi Prius and partly in Banc, have hardly received sufficient attention.

The useless expenditure of force, and occasional danger of miscarriage where the work is, so to speak, done bit by bit and not at a single time, upon a con-

sideration of all relevant circumstances, whether of law or fact, are I think considerable (a).

On the other hand no one who has had any experience in the hearing of Equity suits can have failed to see how frequently a cause is, beyond reasonable doubt, rightly and satisfactorily, though perhaps not very scientifically, decided upon a single contempo-

(a) The recent case of *Cory v. Patton*, relating to underwriters' slips, will illustrate what is here said. In Hilary term, 1872, the question whether an assured is bound to communicate to the underwriter facts material to the risk insured against which may, after slip signed by the latter, but before the policy is executed, come to the knowledge of the former, was, on demurrer to replication, decided in favour of the plaintiffs (the assured), but so decided only on the assumption that the effect of signing the slip was, in the particular case, as alleged in the replication. (See L. R. 7 Q. B. 304.)

On the case coming on for trial at *Nisi Prius* (Dec. 12th, 1872), the correctness of the allegation in the replication, and consequently the whole foundation of a judgment on which the acumen of three judges had been expended, was called in question, and fresh questions of law then raised were reserved, with power to the Court to enter a verdict one way or the other, or to grant a new trial : subject to which a verdict was entered for the plaintiffs.

The present position of the cause is, I believe, as follows. The decision of the Court of Queen's Bench cannot be taken to the Exchequer Chamber (nor would this be desirable) until the issues of fact are finally disposed of. The questions raised at the *Nisi Prius* trial, including the question whether there shall or not be a new trial, can hardly be argued and determined in Banc before the end of the year 1873, and if a new trial be granted it can hardly be had until 1874.

Meanwhile the question whether the judgment of the Court of Queen's Bench on the demurrer is to stand or not remains in suspense.

If the defendant should ultimately succeed on the issues of fact there will have been a needless expenditure of force upon the decision of the demurrer.

If the plaintiffs should succeed, the defendant may question the decision of the Court of Queen's Bench on the demurrer by going successively to the Exchequer Chamber and House of Lords, and should he ultimately succeed, the *Nisi Prius* trials and argument in Banc will have been thrown away.

aneous consideration of all the law and all the facts so far as ascertained, without the advantage of *vivâ voce* evidence. Nor can it be doubted that the same cause would in all probability be decided no better, though at far greater expense, by means of an elaborate previous Nisi Prius trial, followed or preceded (a) by a separate consideration of the points of law arising in the case.

Now it is by no means easy to provide a satisfactory procedure whereby the advantages of *vivâ voce* evidence shall be combined with those of a single trial before a judge of fact as well as law.

The following seem to be the principal difficulties :—

Where a cause is tried upon the law and facts all at once, as in a Chancery suit, before a single judge who is already burdened with the task of selecting for himself the substantial issues between the parties, *vivâ voce* examination in open Court adds so much to his labour that it may fairly be doubted whether to select the issues, to bear in mind the law, and to control the current of *vivâ voce* evidence, be not beyond the average strength of a single judge.

Again, if the Judge is to be the judge of fact as well as law, there is great difficulty, where the evidence is given *vivâ voce*, in providing any satisfactory machinery for reviewing his judgment upon matter of fact, since if his notes are to be adopted they will be the reflection of his own views and bias; and if shorthand notes are resorted to, the case is at once crushed beneath the weight of its own evidence.

(a) Or possibly both preceded and followed : see last previous note.

The result would seem to be that wherever there is to be a trial simply upon *visà voce* evidence, and *a fortiori*, if that trial is to be before a jury, the old Common Law practice of a separate trial upon separate ascertained issues will be the most convenient course, and that having regard to the advantages of a single trial upon law and fact combined, the procedure of trial upon *visà voce* evidence should not be applied without a careful exception of those classes of cases in which there would be more loss than gain in insisting on its application.

I am aware that it may be hereupon said :—“ Then “ after all you tolerate difference of procedure, and the “ struggle which you have spoken of will still take “ place as to the mode of trial to be adopted in parti- “ cular cases.”

No doubt there would be such struggles. Under any system of procedure, however single and uniform, the litigants will strive for advantages, small or great. But the struggle would be of a very different nature from that which now occurs with a view to shifting or retaining the whole jurisdiction. It would be reduced to the dimensions of a contest whether the Court itself, then one and entire, should adopt one or another of two modes of trial for the purpose of reaching the justice of the case. The struggle (though more important) would be akin to those which now take place every day at Judges' Chambers respecting a change of *venue* desired by one side and opposed by the other.

There remains to be considered the fifth circum-

stance of difference, that which I have called "Locality of Trial."

The Common Law, so far as respects trial of questions of fact, provides for this trial taking place in the immediate neighbourhood, as far as practicable, of the parties and witnesses.

The Courts are, so to speak, ambulatory for the purpose of trying facts, though fixed at Westminster for the purpose of deciding matters of law.

The superior Equity Courts on the other hand are altogether sessile and immovable.

This difference has a considerable bearing upon the two questions last discussed, that of jury trial and of examination of witnesses in open court.

To the extent to which trial by jury is to be retained as part of our system for deciding civil rights, provision must be made for trying issues of fact elsewhere than in the metropolis. This is obviously necessary, since neither could the required jurors be taken exclusively from the neighbourhood of the metropolis alone, nor would it be reasonable to bring to London jurors living at a great distance.

The expediency, however, of applying the circuit system, or some equivalent, to cases where the whole matter, fact and law, is tried by a judge without a jury, with a view merely to the more convenient and less expensive examination of witnesses in open court, may admit of some doubt.

There would seem at first to be more real waste in such a case in carrying the judge, the bar, and the attorneys to the neighbourhood of the witnesses, than

in compelling the witnesses to come to the metropolis.

There is, of course, this material difference between taking the judge to the witnesses and bringing the witnesses to the judge, viz., that in the former case the waste of judicial time falls on the nation, and in the latter the additional cost falls on the suitor.

This, however, is a question closely connected with one discussed in the Second Report of the Judicature Commissioners, and to ventilate it thoroughly it would be requisite to refer to the recommendations made by that Report, and I have barely time left for summing up.

The following general conclusions may, I think, be safely come to :

1. That the evils of the present state of things are not inconsiderable.

2. That the only satisfactory mode of removing them is by " Fusion."

3. That the difficulties in the way of fusion, which it must be admitted require careful handling, are (*omitting questions of administrative organisation which I have not considered*) mainly difficulties in respect to future procedure and practice, and more especially mode of trial.

It must not, however, be supposed that the questions which I have summarily left out of account are either less difficult or of less importance than those which I have discussed. The blending of the superior Courts into one High Court of Justice and their reorganisation for the purpose of litigation in the first instance, and by way of appeal, must be a task of considerable com-

plexity and difficulty, and it is connected with the quasi-political question of the ultimate appellate jurisdiction of the House of Lords, and Her Majesty in Council.

Again, the proposition made by the Second Report of the Judicature Commissioners to incorporate the County Courts into the general supreme Court of Justice, and establish in various localities Courts of First Instance, is perhaps one of still greater complexity and difficulty.

In discussing, however, the question of "Fusion," my object was to dwell upon those aspects of the subject which are more purely professional, and to assist the law students of this Society to an intelligent consideration of the question as respects more particularly procedure and practice.

In conclusion I may say that it is difficult for any one who notes the signs of the times to resist the conviction that the present system of double jurisdiction is doomed to die, and that it will be succeeded by Fusion in some form or other; but whether this be effected by codification, or in some such mode as that attempted in 1870—whether the scheme for establishing throughout the country local centres of primary jurisdiction, administering law and equity combined, be adopted or rejected—that portion of the subject which, within the narrow limits of time allowed me, I have endeavoured this evening to elucidate, must, to a great extent, retain its special importance and special interest even after fusion shall have been effected.

APPENDIX.

MR. BARBER'S STATEMENT

ON THE PRACTICE AND PROCEDURE OF THE COURT OF CHANCERY IN ENGLAND (*a*).

THE practice and procedure of the Court of Chancery in England may be conveniently considered in the following order :—

- I. The procedure in an ordinary suit down to the decree.
- II. Procedure after a decree until a final order.
- III. Special practice in particular kinds of suits and proceedings.
- IV. Interlocutory applications.
- V. Revivor and supplement.
- VI. The mode of enforcing decrees and orders.
- VII. Re-hearings and appeals.
- VIII. Summary statutory jurisdiction of the Court.

(*a*) The above statement is, with other papers, appended to the First Report (1863) of the "English and Irish Law and Chancery Commission."

Mr. C. Chapman Barber, of the English Bar, and Mr. Jellett, of the Irish Bar, having been requested to draw up, for the assistance of the Commissioners, a concise statement of such parts of the procedure of the Superior Courts of Equity as were peculiar to England, and of such

parts as were peculiar to Ireland, appear to have found that the practice and procedure of the two countries, originally similar, had, by the effect of modern legislation, become almost entirely different, and that such a statement as they had been requested to furnish would necessarily involve a general statement of the modern practice and procedure in each country. They therefore drew up, separately, statements of the practice and procedure of the

I.—THE PROCEDURE IN AN ORDINARY SUIT DOWN TO THE DECREE.

Form of Bill.—A suit is commonly commenced by a Bill entitled thus :—

IN CHANCERY.

Lord Chancellor.

Vice Chancellor (*name of Vice Chancellor*).

or

Master of the Rolls.

Between *A.B.*,

Plaintiff.

C.D. & E.F. Defendants.

The bill, the draft of which must be settled and signed by counsel, is, unless under exceptional circumstances (*a*), addressed to the Lord Chancellor. It contains a statement, in paragraphs numbered consecutively (*b*), of the facts on which the plaintiff relies as constituting his title to relief, and concludes by a prayer, asking specifically such relief as the plaintiff conceives himself entitled to, and also asking general relief. The names of the defendants are repeated in a note at the foot of the bill.

Information.—When a suit is instituted on behalf of the Crown, or of persons under its peculiar protection, as, for instance, the objects of a public charity, the pleading by which the suit is commenced is called an information. The Attorney-General or Solicitor-General, technically called the

Courts of Chancery in England and in Ireland, omitting, as a general rule, such portions of practice and procedure as are still common to both countries.

The statement here reprinted, from the papers laid before Parliament, is the separate statement prepared by Mr. Barber. The portions having an exclusive relation to the special objects of the Commis-

sion are so trifling that it has been thought better to print the paper *in extenso*. The notes and references, which make no pretension to completeness, have been added by the author of the foregoing Lectures, with a view to the assistance of students.

(*a*) As where the Chancellor is a party.

(*b*) 15 & 16 Vict. c. 86, s. 10.

informant, is then the complainant. If the suit concerns merely the rights of the Crown, and in some other cases, which it is unnecessary for the present purpose to particularize, the Crown officer alone prosecutes the suit. More frequently, however, the suit is instituted at the instance of some private individual, commonly called the relator, who has the conduct of the suit, and who is responsible to the defendants for such costs, if any, as the Court may think fit to award to them.

Information and Bill.—In some cases, as, for instance, when a private right connected with a public object is sought to be enforced, the remedy is by an information and bill combined.

Parties.—Generally speaking, all persons who are interested in the subject-matter of the litigation should be parties to the bill either as plaintiffs or defendants, but the strict rule has been considerably modified by the statute of 1852 (15 & 16 Vict. c. 86, s. 42). The general effect of the relaxation may be stated as follows :

- (a) Where there is property to be administered under a will, an intestacy, or a deed or other instrument of trust, any one person interested in the property may obtain a decree for its administration by the Court without making the other persons beneficially interested parties.
- (b) In cases of suits for the protection of property, one person may sue on behalf of himself and all others interested.
- (c) Where real estate is vested in trustees, the trustees, in reference to adverse litigation for or against the trust estate, represent their *cestuis que trust*, in like manner as executors or administrators represent persons beneficially interested in the personal estate of deceased persons.

Formal parties.—Notwithstanding these provisions it may

still be necessary or convenient for a plaintiff, in some cases, to make defendants to a bill persons from whom no account or other direct relief is sought. In such cases he may, as against such persons, merely pray that they may, upon being served with a copy of the bill, be bound by the proceedings in the cause, and adopt the special course with regard to serving them which will be mentioned under the head of "Service" (a).

Selection of Court.—The draft of the bill being completed, and the plaintiff or his solicitor having determined the particular branch of the Court to which the suit shall be attached, the bill is marked accordingly (b).

Printing and Filing Bill.—The bill so marked is printed upon paper and in type prescribed by the orders of the Court (c), and a printed copy is taken to the Office of the Clerks of Records and Writs, and there filed. The copy must have indorsed upon it the name, firm, and place of business of the solicitor filing it, and if his place of business is more than three miles from the Record and Writ Office, an address within those limits must be added, where notices and proceedings may be served (d). If the plaintiff sues in person, he must indorse his own name and residence, and if the latter be beyond the three miles, an address for service within that distance (e). In certain pressing cases (viz., where an *Injunction* or a writ of *Ne exeat regno* is prayed, or it is sought to make an infant a ward of Court) a written copy of the bill may be filed in the first instance upon an undertaking to file a printed copy within 14 days (f).

Transfer of Causes.—It may here be observed, that although the plaintiff has the right in the first instance of selecting the Court to which the suit is to be attached, the Lord Chancellor has the power of transferring any cause from the paper of any of the Vice-Chancellors to that of any

(a) See next page.

(b) Consol. order vi, rule 1.

(c) Consol. order ix, rule 3.

(d) Consol. order iii, rule 2.

(e) Consol. order iii, rule 5.

(f) 15 & 16 Vict. c. 86, s. 6.

other of the Vice-Chancellors ; and that the Lord Chancellor and the Master of the Rolls have power to transfer causes to or from the paper of any of the Vice-Chancellors, from or to that of the Master of the Rolls ; and that these powers are frequently exercised.

Service.—After the bill has been filed the plaintiff proceeds to serve the defendants with copies, previously procuring such copies to be authenticated with the stamp of the Record and Writ Office (*a*). Such service is effected either personally on each defendant, or by leaving the copy with some servant or member of his family at his dwelling house or usual place of abode (*b*). Each copy served contains an endorsement requiring the defendants to enter an appearance within eight days, and informing them that if they fail to do so the plaintiff may enter an appearance for them, and that they, the defendants, will be liable to be arrested and imprisoned, and to have a decree made against them in their absence (*c*). Regular service is, however, in a large number of cases dispensed with on the solicitor of the defendants giving to the plaintiff's solicitor an undertaking to appear.

Service upon formal parties.—As regards merely formal parties whom the plaintiff seeks to bind by serving them with a copy of the bill, the service must be within 12 weeks after the filing of the bill, and the usual endorsement is omitted from the copy of the bill served, the intention being that the defendant should not appear unless he himself is desirous of doing so (*d*).

Appearance.—Where parties are served in the ordinary way, or an undertaking to appear is given, appearances are commonly entered in due time in the Record and Writ Office. Every appearance, and indeed every proceeding filed

(*a*) 15 & 16 Vict. c. 86, s. 3.

(*b*) Consol. order x, rule 1.

(*c*) The form is that prescribed by the schedule to 16 & 17 Vict. c. 86, as varied by Consol. order ix,

rule 2. For the special practice where the defendant is a corporate body or a peer, see Braithwaite's Record & Writ Practice, 29.

(*d*) Consol. order x, rule 11.

at the Record and Writ Office, must have an address for service within three miles from the office (a). A formal defendant merely served with a copy of the bill and not required to enter an appearance, though under no obligation to appear, may, if he thinks fit, as of course within 12 days after service, and subsequently with special leave of the Court (b), enter a common appearance, and if he does so, the suit will be prosecuted against him in the ordinary way, but the costs occasioned thereby are paid by the party appearing unless the Court otherwise directs (c). A formal defendant may, however, take a course intermediate between that of appearing simply and not appearing at all, by entering a special appearance "for the purpose of being served with notice of all proceedings in the Suit" (d), in which case he does not become a complete party to the suit, but is merely served with notice of all proceedings. This special appearance is entered (if at all) within the same time, and subject to the same liability as to costs occasioned thereby, as in the case of a common appearance by a formal defendant.

Practice as to service upon formal parties not much followed.

—It may here be observed that the practice of merely serving formal parties with a copy of the bill without requiring them to appear, has been much less resorted to since it has become unnecessary to call for an answer from each defendant made a party in the ordinary way. The practice, however, is still useful and convenient in some cases.

Substituted Service.—Where a defendant is resident out of the jurisdiction, or evades service of the bill, the Court will frequently order service to be substituted upon some person shown to be the agent of the defendant for the purposes of the suit, or (perhaps) for a purpose connected with the suit. The principle upon which the Court acts in directing substituted service is to sanction such service as there is reasonable

(a) Consol. order iii, rule 2.

(c) Consol. order x, rule 14.

(b) Consol. order x, rule 16.

(d) Consol. order x, rule 15.

ground for believing will come to the defendant's knowledge. In certain cases, substituted service is ordered almost as of course. For instance, where a defendant in equity, resident out of the jurisdiction, is suing the plaintiff in an action at law, service is commonly substituted on the attorney at law, and where the bill to which appearance is sought is a cross bill merely, service is similarly substituted on the solicitor acting for the defendant as plaintiff in the original bill. When substituted service is so made, a copy of the order authorizing substitution should be served at the same time.

Service out of the jurisdiction.—Where a defendant is out of the jurisdiction, the Court upon application supported by evidence, showing in what country or place the defendant may probably be found, may order a copy of the bill (and if an answer is required, a copy of the interrogatories) to be served in such place or country as the Court shall think fit; and the order, if made, limits a time for appearance after service, and a time for pleading, answering, or demurring. In serving the bill, a copy of the order must be served at the same time (a).

It is a matter for the discretion of the Court to grant or withhold the order, but the order is commonly obtained without difficulty (b).

Entering appearance for defendant.—Where a defendant (not being an infant or a person of weak or unsound mind), who is duly served either within or without the jurisdiction, fails to appear within the time limited for appearance, the plaintiff may, as of course when the service is within the jurisdiction, and he takes that step within three weeks after

(a) Consol. order x, rule 7.

(b) The practice of the Court as to ordering service out of the jurisdiction was, after a period of uncertainty introduced by the decisions of Lord Westbury in *Cookney v. Anderson*, 1 De Gex, Jones &

Smith, 365; *Foley v. Maillardet*, *ib.* 389; and *Samuel v. Rogers*, *ib.* 396, ultimately settled in *Drummond v. Drummond*, L. R. 2 Ch. App. 32, which the student may consult with advantage.

the time for appearance has expired (*a*), and in other cases with leave of the Court obtained on special application, enter an appearance for the defendant (*b*).

Case of defendant absconding.—If the particular defendant whom it is desired to serve cannot be found, and it can be shown that he has been within the jurisdiction at some time not more than two years before bill filed, and that there is just ground for believing he has gone out of the realm or absconded to avoid process, an order may be made directing his appearance within a certain day, and a copy of the order is then published in the London Gazette and otherwise as directed by the Court, together with a notice to the effect that if the defendant does not appear by the time named in the order, the plaintiff may enter an appearance for him; and on proof of publication and non-appearance, the Court subsequently authorizes the plaintiff to enter an appearance (*c*).

Object and effect of entry of appearance by plaintiff for a defendant.—The entry of an appearance for the defendant by the plaintiff in some or one of the modes adverted to, is principally useful as limiting the time within which a demurrer may be filed to the bill, which runs from the entry of the appearance (*d*); and as a preliminary step towards taking the bill *pro confesso* against the defendant (*e*). The plaintiff however, notwithstanding his having entered an appearance for the defendant, unless and until he has obtained an order to take the bill *pro confesso* against the defendant, is still under an obligation to serve the defaulting defendant personally, or at his dwelling house or office, with notice of the subsequent proceedings in the cause, an obligation which he can only discharge by obtaining special leave from the Court, that notice in the Gazette shall be good service. The

(*a*) The order (Consol. order x, rule 4) says "within three weeks from the time of *service*."

(*b*) Consol. order x, rule 4.

(*c*) Consol. order x, rule 6.

(*d*) Consol. order xxxvii, rule 3.

(*e*) Consol. order xxii, rule 2.

defendant, on the other hand, cannot take any step in the cause without first entering an appearance in the ordinary way ; and though he may do this, as of right (*a*), this appearance does not affect the prior proceedings or prejudice any right acquired by the plaintiff.

Case where defendant is an infant or of unsound mind.—Where a defendant is an infant or a person of weak or unsound mind not so found by inquisition, some relative is commonly induced to undertake the defence, and is appointed guardian *ad litem* ; but in default of this, the Court upon the application of the plaintiff orders that one of the solicitors of the Court (usually the solicitor to the Suitors' fund), be assigned as guardian, and the defendant then appears, and defends by the guardian so appointed (*b*).

Demurrer.—The defendant may, within twelve days after appearance, entered by or for him, demur to the bill (*c*). The grounds upon which a demurrer may be filed are various, and it is unnecessary for the present purpose to specify them. The most common cause of demurrer is that the plaintiff has not, by his bill, shown any title to relief. The demurrer must be signed by counsel (*d*). It is engrossed on parchment, and filed at the Record and Writ Office by the solicitor for the demurring party, who must the same day (an obligation which applies equally in the case of other pleadings, such as plea, answer, or replication), give notice to the plaintiff's solicitor of its having been filed (*e*).

Setting down demurrers.—Either party is at liberty to set the demurrer down for argument immediately (*f*). The non-exercise of this option by the demurring party brings with it no liability on his part, but should the plaintiff abstain for twelve days to set down a demurrer to the whole

(*a*) Consol. order x, rule 9.

(*b*) Consol. order vii, rule 3.

(*c*) Consol. order xxxvii, rule 3.

(*d*) Consol. order viii, rule 1.

(*e*) Consol. order iii, rule 9.

(*f*) Consol. order xiv, rule 11.

bill (a), or for three weeks to set down a demurrer to part of the bill (b), the effect (unless in the meantime he should have obtained and served an order to amend his bill) is the same as if the demurrer had been allowed on argument. Assuming, however, the demurrer to be duly set down for hearing, it is argued in Court on an early day, when the Court either allows or overrules the demurrer. If it is allowed, and the Court does not give leave to amend the bill, the suit is at an end as to the demurring defendant. If the demurrer is overruled, or leave is given to amend the bill, the suit proceeds.

Plea.—If the bill states a case for relief, but a defendant has a short simple defence to the bill, *e. g.*, the Statute of Limitations, or a release, or that he is a purchaser for valuable consideration without notice, he may raise the defence by means of a plea, instead of meeting in detail the allegations contained in the bill. A plea is signed by counsel (c), engrossed on parchment, and filed at the Record and Writ Office. Except when relating to matters of record, it is put in on the oath of the defendant. In reference to a plea, two questions necessarily arise, *viz.*, (1), whether it is a sufficient answer in law? and (2), whether it is true in fact? The first question is disposed of by setting the plea down for argument before the Court, when the Court decides whether, assuming the *truth* of the plea, it is or not an answer to the case made by the bill. In the former case it is allowed, in the latter overruled. Technically the allowance of a plea only determines its sufficiency in *law*, and leaves the question of its *truth* to be litigated by the parties going into evidence upon the short point raised by the plea. In most cases, however, upon a plea being allowed, the bill is out of Court, for the plea having been put in upon oath, or being capable of proof by record, is almost invariably true.

(a) Consol. order xiv, rule 14.

(b) *Ibidem*, rule 15.

(c) Consol. order viii, rule 1.

If, therefore, the plea is, in law, an answer to the plaintiff's case, it is generally useless for the plaintiff to continue the contest. When a plea is overruled, the order overruling it commonly directs the plea to stand as an answer to the bill, with liberty for the plaintiff to call for a fuller answer as to any matters which may not be sufficiently met by the plea.

Setting down pleas.—The duty of a plaintiff in reference to setting down a plea which has been filed is analogous to that above explained with regard to demurrers, that is, unless the plaintiff takes issue on the question of *truth* by undertaking to reply, he must set the plea down within 3 weeks (*a*). If he neither undertakes to reply nor sets down the plea, nor serves an order for leave to amend, within that time, the effect is the same as if the plea had been allowed on argument. And where the plea is to the whole bill the plaintiff is viewed as having declined to try the question of truth, and the defendant, who has pleaded, may obtain, as of course, an order to dismiss the bill with costs.

Assuming the defendant neither to demur nor plead to the whole bill, or to do so unsuccessfully, the suit proceeds according to what may be called the ordinary course, as being that which prevails in the larger number of causes.

Interrogatories.—According to the practice of the English Court, the plaintiff has a right to require each defendant to answer, upon oath, interrogatories in reference to the subject matter of the suit (*b*), and generally, though not always necessarily, founded on allegations contained in the plaintiff's bill. These interrogatories are numbered consecutively; they are settled and signed by Counsel. One set of interrogatories is usually filed for the examination of all the defendants required to answer, though each defendant may not be required to answer every interrogatory, and a note is added at the foot specifying the interrogatories which each

(*a*) Consol. order xiv, rule 17.

(*b*) 15 & 16 Vict. c. 86, s. 12.

defendant is required to answer (a). The interrogatories must be filed, and copies thereof, omitting those which are not required to be answered by any particular defendant or set of defendants, are delivered to the defendants respectively required to answer within certain times prescribed by the orders of the Court (b).

Production of documents.—Under the old practice the plaintiff almost always, as a matter of course, interrogated the defendant respecting the documents in his possession or power relating to the matters alleged by the bill. This practice has not been abolished, and is still not unfrequently followed ; but, under the modern practice (c), the discovery as to documents is commonly obtained from the defendant by summary proceedings at chambers, as follows :—

The plaintiff takes out a summons and obtains thereunder an order that the defendant do, within a given time after service (d), make, in a form prescribed by the practice, an affidavit as to the documents in his possession or power relating to the matters in question in the suit, and directing him to produce, for the inspection of the plaintiff, such of the documents admitted to be in his possession as he does not, by the affidavit, object to produce. If the defendant, by his affidavit, objects to produce any of the documents admitted to be in his possession, and the plaintiff is advised that the objections are untenable, he applies again, by summoning the defendant at chambers for production of such documents, and in such case the summons is generally adjourned to be argued before the Court. If the plaintiff considers the affidavit evasive or insufficient, he applies by summons at chambers, that the defendant may make a further affidavit, and an order to that effect is accordingly made, if, in the opinion of the Judge, either at Chambers, or

(a) Schedule B to Consol. orders.

(b) Consol. order xi, rules 4, 5.

(c) 15 & 16 Vict. c. 86, s. 18.

(d) This order needs personal

service, the process in the event of its not being obeyed, being by attachment.

in Court upon the summons being adjourned into Court, the affidavit is insufficient (*a*). This summary procedure may be resorted to by the plaintiff as soon as the defendant has appeared, and may be prosecuted whether the defendant has or has not been required to answer; and if required to answer whether he has or has not been interrogated as to documents.

When the interrogatory filed for the examination of the defendant in answer to the bill includes an interrogatory as to documents, and such interrogatory has been fully answered, the practice is to apply at chambers for production upon the admissions in the answer.

Answer.—Next as regards the ordinary course of defence. The plaintiff having filed and served interrogatories, the defendant is compelled to put in an answer within a time limited by the orders of the Court (*b*), which is frequently extended by special order. The answer, the draft of which must be signed by Counsel (*c*), does not at the commencement or in the body of it appear to be made on oath. It is, however, sworn in the same manner as an affidavit, except that the oath actually administered is of a qualified kind, *i.e.*, the person answering swears that what is contained in the answer, so far as concerns his own acts, and deeds, is true to his own knowledge, and so far as relates to the acts and deeds of other persons is believed by him to be true. The answer so sworn is filed in the Record and Writ Clerks' Office. The answer filed may be either printed or written (*d*). Any schedules annexed to the answer must be filed with it, whether the answer actually filed is printed or not. Printed copies are made of the answer for the use of the parties to the suit, omitting the schedules. The plaintiff obtains a written copy of the schedules from the Record and Writ Office.

(*a*) See as illustrating the practice, *Noel v. Noel*, 1 De Gex, Jones & Smith, 468; *Wright v. Pitt*, L.R. 3 Ch. App. 809.

(*b*) Twenty-eight days from the

delivery of the interrogatories. See Consol. order xxxvii, rule 4.

(*c*) Consol. order viii. rule 1.

(*d*) Order of March 6, 1860, rules 1, 5.

Exceptions.—An answer commonly contains not only a discovery respecting the matters inquired after by the interrogatories, but also a statement of such matters as the defendant considers material to be stated for the purposes of his defence (*a*). As regards the last-mentioned portion of the contents of the answer the plaintiff has no control, but should he consider that a full discovery is not afforded respecting the matters inquired after by the interrogatories, he is entitled, within a time fixed for that purpose by general orders (*b*), to except to the answer for insufficiency. This he does by filing in the Record and Writ Clerks' Office exceptions, the draft of which must be settled and signed by counsel (*c*), mentioning the particular interrogatories or portions of interrogatories which he considers to be insufficiently answered, and unless the defendant within a limited time submits to answer the interrogatories in the points excepted to, the exceptions are set down for argument before the Court, upon which argument the Court decides whether the answer is sufficient in the points excepted to or not. If the answer is held insufficient the defendant is compelled to put in a further answer, and if the plaintiff considers the answer still insufficient, the exceptions are again set down for argument before the Court. If the second answer is considered to be insufficient the same course of proceeding is adopted; but upon a third answer being held to be insufficient, the Court may order the defendant to be examined orally upon interrogatories on the points as to which it is held to be insufficient, and to stand committed until he shall have perfectly answered the interrogatories (*d*).

Voluntary answer.—If the plaintiff does not file interrogatories, the defendant's advisers have to consider whether he shall put in a voluntary answer or not. If his defence depends upon the simple negation of some one or more of

(*a*) 15 & 16 Vict. c. 86, s. 14.

(*b*) Consol. order xvi, rule 6.

(*c*) Consol. order xvi, rule 1.

(*d*) Consol. order xvi, rule 19.

the facts alleged by the bill, no answer is requisite, since his mere silence is, for the purposes of pleading, equivalent to a traverse by him of the case made by the bill (a). If, on the other hand, the defendant's case mainly depends upon independent facts not disclosed by the bill, it is often advisable for him to put in a voluntary answer, which he must do within a limited time. A voluntary answer is sworn and filed like a compulsory answer, and printed in like manner. It is not, however, liable to exception for insufficiency.

Amendment of Bill.—The defendant's answer, compulsory or voluntary, as the case may be, having been put in, or no answer having been required, and the time for putting in a voluntary answer having expired, the plaintiff has to determine whether he can safely carry the cause to a hearing upon the pleadings as they then stand. The answer of the defendant may show, or the plaintiff may have otherwise ascertained, that the bill contains errors of statement calling for rectification, or that a defence has been or may be set up capable of being neutralized or weakened by the statement of material facts hitherto unnoticed. In these and other cases it frequently becomes advisable for the plaintiff to amend his bill.

Rules as to amendment with respect to time, &c.—Before answer the plaintiff may amend his bill at pleasure on obtaining an order of course for the purpose (b). After answer, where there is only one defendant, or all join in one answer, the plaintiff may amend once, and once only, as of course, on obtaining an order for this purpose at any time within four weeks after the answer is deemed sufficient (c). If there are several defendants who do not join in answering, he may similarly amend once only at any time within four weeks after the last answer required is to be deemed sufficient (d). In order to obtain leave to amend a second time after answer

(a) 15 & 16 Vict. c. 86, s. 26.

(b) Consol. order ix, rule 8.

(c) Consol. order ix, rule 10.

(d) Consol. order x, rule 11.

except for the purpose of amending clerical errors in names, dates, or sums, which may be done at any time (*a*), the plaintiff must apply upon affidavit, showing, 1st, that the draft of the proposed amendments has been signed, settled, and approved by counsel; and, 2ndly, that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the plaintiff (*b*). And if the plaintiff applies for leave after the expiration of the four weeks referred to he must, in addition, show by affidavit that the matter of the proposed amendment is material and could not, with reasonable diligence, sooner have been introduced into the bill (*c*). It may be stated generally, that leave to amend is rarely refused, unless there has been extraordinary delay, or the Judge is satisfied that the proposed amendments are vexatious.

Mode of making amendments.—The amendments are made by written alterations on the printed bill filed, and by additions on paper, to be interleaved therewith, subject to the restriction that not more than two folios, 144 words (*d*), of new matter can be introduced continuously at the same part of the original bill. Should this limit be exceeded, the whole bill as amended must be reprinted, and a reprinted copy filed. The draft of the amended bill must be signed by counsel. It is, speaking generally, competent to the defendant to demur or plead to the amended bill, as in the case of an original bill (*e*).

Further interrogatories.—Should the plaintiff require a further answer as to the allegations in the amended bill, he

(*a*) Consol. order ix. rule 2.

(*b*) Consol. order ix, rule 14.

(*c*) Consol. order, ix, rule 15.

(*d*) The 15 & 16 Vict. c. 86, s. 8, permits amendments when according to the then present practice of the Court, an amendment might be made without a new engrossment. At that time the folio, since reduced to 72 words, was of 90

words; consequently additions may, notwithstanding the reduction, still be made to the extent of 180 words at the same place.

(*e*) But not to demur to the amended Bill upon any ground upon which the original Bill might have been demurred to; see *Attorney-General v. Cooper*, 8 Hare, 166.

files additional interrogatories, and delivers copies as before explained; and the defendant, if new interrogatories are filed, puts in a further answer by compulsion. If the plaintiff does not file further interrogatories, the defendant either puts in a voluntary answer or not, as he may be advised in reference to the circumstances of the particular case.

Demurrer, plea, and answer.—It may here be observed that one portion of a bill may be demurrable, another portion may be capable of being met by plea, while to the remainder it may be necessary to put in an answer. In such a case each mode of defence may be used by one and the same pleading, which is styled a demurrer, plea, and answer, and each portion of which is subject to the same rules as if the said defences had been made severally to several bills. A similar rule applies where two only of these defences are applicable to different portions of the same bill.

Closing the pleadings.—When the pleadings are complete there are three modes of proceeding to bring the cause to a hearing.

(I.) By setting the cause down on bill and answer.

(II.) By giving a notice of motion for a decree.

(III.) By replication.

I. *Hearing on bill and answer.*—This course is only resorted to where the defendant, if only one, or all the defendants, if more than one (other than merely formal defendants, if any, served with copies of the bill), have answered, and where the plaintiff requires no evidence in support of his case, except the answers of the defendants, and the proof by affidavit or *vivâ voce* at the hearing of any documents which, though not disputed, may not be admitted by the answer. The defendants in this case require no evidence, being entitled to read their answer as evidence against the plaintiff.

II. *Motion for decree.*—The practice of moving for a decree is of recent date. It owes its origin to the Act of 1852 (15 & 16 Vict. c. 86, s. 15).

The plaintiff having filed at the Record and Writ Office such affidavits as he considers will, with the admissions contained in the answers, if any, of the defendants, be sufficient to support his case, gives notice to the defendants (other than merely formal defendants, if any, served with copies of the bill) that he intends, at the expiration of one month from the date of the notice (*a*), to move for a decree, and at the foot of the notice of motion the plaintiff specifies the affidavits which he intends to use in support of the motion (*b*). The defendant has a fortnight's time (*c*) (often extended by special order) to file affidavits in answer, and the plaintiff has a week (*d*) (also often similarly extended) to file affidavits in reply, but the affidavits so filed must be strictly in reply, and no further evidence is allowed on either side without special leave of the Court, which is very rarely granted, and as a rule upon payment of costs.

Affidavits.—It may here be conveniently noticed that all affidavits, whether to be used on a motion for decree or in any other proceeding, must be expressed in the first person (*e*), must be divided into paragraphs, numbered consecutively (*f*), and show at the foot on whose behalf they are filed (*g*). By a recent general order (16 May, 1862) affidavits and depositions to be used on the hearing of a cause on motion for decree or after issue joined, except such as have been filed for the purpose of interlocutory applications, are directed to be printed.

Setting down cause on motion for decree.—As soon as the notice of motion is given, and without waiting for the expiration of the month, the cause may be set down in the Cause List to be heard on the motion for a decree (*h*). The cause having been placed in the ordinary Cause List, is heard in its

(*a*) Consol. order xxxiii, rule 4.

(*b*) Ibidem, rule 5.

(*c*) Ibidem, rule 6.

(*d*) Ibidem, rule 7.

(*e*) Consol. order xviii, rule 1.

(*f*) 15 & 16 Vict. c. 86, s. 37.

(*g*) Order of Feb. 5, 1861, rule 18.

(*h*) See Sixth Regulation (by Registrars), of March 15, 1860.

turn, subject to the restriction that it cannot come into the paper for hearing until the month has expired, and of course cannot be heard until the evidence is complete.

This procedure is in many respects very convenient, and is adopted very frequently. It differs from the ordinary proceeding on interlocutory motions (to be presently mentioned) in the following respects ; that the motion for decree goes into the ordinary Cause List, and that instead of the parties filing affidavits in turn until they are exhausted, a limit is prescribed.

Cross-examination on affidavits.—Persons making affidavits to be used on a motion for decree, are subject to cross-examination on such affidavits before the examiner by the parties desiring to cross-examine them, or by their solicitors or counsel, in the presence of the other parties, their solicitors or counsel (*a*). The answers of parties to the suit, are for the purposes of the motion for decree treated as affidavits (*b*), which the plaintiff may read as against the particular defendant answering without any notice, but as against other defendants only upon notice (*c*). Parties who have put in answers are, upon motion for decree, subject to cross-examination before the examiner in the same way as persons making affidavits.

The Court is at liberty, if it thinks fit, to refuse the motion and give leave to the plaintiff to bring on the cause more formally (*d*) ; but in practice it seldom exercises its discretion in this way. The hearing of the motion is treated as being to all intents and purposes the hearing of the cause.

III. *Replication.*—If the plaintiff does not set the cause down on bill and answer, or proceed by way of motion for decree, his course is to file replication.

(*a*) 15 & 16 Vict. c. 86, s. 40.

(*b*) 15 & 16 Vict. c. 86, s. 15.

(*c*) For the practice as to reading affidavits on notice for decree, see

Stephens v. Heathcote, 1 Drewry & Smale, 138.

(*d*) 15 & 16 Vict. c. 86, s. 16.

At this point it becomes necessary to notice other possible contingencies of pleading besides those of a compelled or voluntary answer, and of a defendant not required to answer and abstaining from so doing. It sometimes happens that a plaintiff, after filing interrogatories, is unable, without great delay and expense, to obtain a full answer from the defendant, and he may be advised that, without an answer, he has sufficient evidence to substantiate his case.

Traversing note.—In this event the plaintiff simply files a traversing note, which is thus worded: "the plaintiff intends to proceed with his cause as if the defendant had filed an answer traversing the allegations made by the bill" (a). If, however, the plaintiff is advised that he cannot safely bring his cause to a hearing without having an answer from the defendant, or an admission by him of the material allegations in the bill, his course is to proceed against the defendant by a process of contempt, *i. e.* to take his body under an attachment with a view to compel to answer.

Taking bill "pro confesso."—Should the defendant persist in refusing to answer notwithstanding the attachment, or should he abscond, then the remedy of the plaintiff is to proceed to take the bill "*pro confesso*" against the contumacious or absconding defendant (b), the effect of which proceeding is that, although the plaintiff may not get the discovery he wants, he obtains in lieu thereof what in contemplation of the Court is equivalent to an actual admission by the defendant of the facts stated by the bill of the plaintiff.

Taking into account these two additional contingencies of the traversing note and of the taking the bill "*pro confesso*," it will be seen that the defendants to a bill (other than merely formal defendants, if any, served with copies of the bill) must fall within some one of the following five classes, namely :—

(a) Consol. order xiii, rule 1.

(b) Consol. order xxii, rule 2.

1. Defendants who, whether required to answer or not, have in fact answered, and by their answers have alleged a case which the plaintiff wishes to controvert.
2. Defendants who have been required to answer but have not answered, and as to whom the plaintiff has filed a traversing note.
3. Defendants who have not been required to answer and have not answered.
4. Defendants who have put in an answer, the truth of which the plaintiff is willing to admit.
5. Defendants who have been required to answer and have not answered, and against whom the plaintiff has obtained an order to take the bill "*pro confesso*."

Form of replication.—Assuming a suit to embrace defendants of all these five classes the plaintiff joins issue by filing against all what is called a replication, in the following form (a) :—

‘ Between *A.B.*

Plaintiff.

and

‘ *C.D. &c. E.F. &c. G.H. &c.*

Defendants.

‘ The plaintiff in this cause hereby joins issue with
 ‘ the defendants *C.D., &c.*, [*all the defendants who have*
 ‘ *answered or pleaded, or against whom a traversing note*
 ‘ *has been filed, or who have not been required to answer*
 ‘ *and have not answered the bill*], and will hear the
 ‘ cause on bill and answer against the defendants *E.F.,*
 ‘ *&c.*, [*all the defendants against whom the cause is to be*
 ‘ *heard on bill and answer*], and on the order to take the
 ‘ bill as confessed against the defendants *G.H. &c.* [*as*
 ‘ *the case may be*].’

If it is not intended to hear the cause on bill and answer as against any defendants, or if the bill is not to be taken

(a) Consol. order xvii.

as confessed against any defendants, the form of the replication is modified to meet the case.

Amendment after replication.—Should it so happen that after replication filed, the plaintiff desires to withdraw his replication and amend, he may do so on the same terms as mentioned with respect to amendment after four weeks from the time of the answer or last answer being deemed sufficient (a).

Evidence.—The cause is now at issue; and the next step is the taking of the evidence, as between the plaintiff and the first three classes of defendants, or such of them as may exist in any particular case. According to the last alteration of procedure (b) unless a special order is obtained for taking evidence *vivâ voce* at the hearing, or a special agreement is entered into, the parties go into evidence, either wholly or partially by way of affidavit, or wholly or partially by the oral examination of witnesses *ex parte* before one of the examiners of the Court, or a special examiner (c). Any witness may be cross-examined in Court at the hearing of the cause.

Vivâ voce evidence at hearing, &c.—In reference to the special exceptions above referred to, it is to be observed: first, that upon summons taken out by any party within 14 days after issue joined, the Judge at chambers may make an order that the evidence in chief as to any particular facts or issues shall be taken *vivâ voce* at the hearing (d), and in such cases, the evidence in chief as to such facts or issues, and also the cross-examination and re-examination relating thereto, are to be taken in that mode (e); and, secondly, that if the parties prefer resorting to the mode of examining witnesses established by the procedure introduced by the Act of 1852, that is to say, by examination and cross-examination and

(a) Consol. order ix, rule 15.

1861, rule 4.

(b) Order as to Evidence, Feb. 5, 1861.

(d) Ibidem, rule 3.

(c) Order as to Evidence, Feb. 5,

(e) Ibidem, same rule.

re-examination before the examiner, (not *ex parte*, but in the presence of the solicitors and counsel on both sides,) they may, upon filing at the office of the Clerks of Records and Writs an agreement so to take the evidence, proceed according to the former practice (a).

Aged, infirm, &c., witnesses.—An order may be obtained at chambers for the oral examination before the Examiner, and in the presence of solicitors and counsel, of any witness where by reason of his age, infirmity, or probable absence out of the jurisdiction, it is expedient that such order should be made (b).

General practice as to evidence.—Having regard to the foregoing explanations, the ordinary practice of the Court as to evidence after issue joined, except the evidence as to particular facts or issues, which may be ordered to be taken *viva voce* at the hearing, may be stated thus: Each party verifies his case, wholly or partially by affidavit, or wholly or partially by oral examination of witnesses *ex parte* before one of the Examiners of the Court or a special Examiner, and there is no cross-examination otherwise than at the hearing of the cause.

Admissions.—In reference to proof of written documents it should be observed that a recent Act (21 & 22 Vict. c. 27, s. 7) provides that in any case in which all parties to a suit are competent to make admissions, any party may call on any other party by notice to admit any document, saving just exceptions; and in case of refusal or neglect to admit, the costs of proof are to be paid by the party refusing or neglecting, and no costs of proof are to be allowed, unless notice to admit be given or the omission to give notice has saved expense. This enactment though limited expressly to suits all parties to which are competent, is in other respects quite general in its terms, and has been to a great extent acted upon as applying to suits generally. There is, how-

(a) Order as to Evidence, Feb. 5, 1861, rule 10.

(b) *Ibidem*, rule 11.

ever, as yet no decision on this point, and it may perhaps be doubted whether the enactment really applies to any other cases than those of jury trial before the Court under the provisions of the Act.

Admissions are, however, apart from the provisions of the Statute, commonly resorted to by arrangement between the parties, more especially in reference to documents, and where the documents to be proved are numerous.

The admission then commonly assumes the form of an agreement between the solicitors, specifying the documents in a schedule ; and modifying and qualifying the admission as to some particular document or documents peculiarly circumstanced. Admissions of this kind often provide also for admitting in evidence copies which the parties have had an opportunity of examining beforehand in lieu of originals.

It is considered that under rule 24 of the Order of the 5th February 1861, admissions may, with the sanction of the Court or Judge at chambers, be entered into on behalf of infants, married women, and persons of unsound mind.

Closing the Evidence.—At the expiration of eight weeks after issue joined the evidence in chief is closed, unless the time be further enlarged (a). And (except by agreement, or in the special cases before stated), the only cross-examination now allowed, where issue has been joined by filing a replication, is at the hearing. When on the replication notice is given of the plaintiff's intention to hear the cause on bill and answer as against any of the defendants, there is in truth no issue joined between the plaintiff and such defendants, and as against them the cause is heard in the same way as if they had been the only defendants to the bill, and as if the cause had been set down on the bill and their answer without any replication.

Subpoena to hear judgment.—As soon as the evidence in chief is closed, the plaintiff may set down the cause and

(a) Order of Feb. 5, 1861, rule 5.

obtain and serve on the defendants a *subpoena* to hear judgment, which must not be returnable less than one month from the *teste* of the writ, and must be served 10 days before the return (a). The cause cannot be heard before the return day of the *subpoena*. In case either party desires to cross-examine *vivâ voce* at the hearing, notice to that effect is given to the party whose witness it is desired to cross-examine; and in order to provide against the contingency of the cross-examination leading to the unnecessary detention of witnesses, and to additional expense, an application may, in cases where a cross-examination is required, be made to the Court or the Judge at Chambers, to fix a day for the hearing of the cause (b).

Entry of memorandum of service on formal defendants.—It may here be noticed that previously to any cause being set down to be heard in either of the three modes of proceeding above explained, the plaintiff must obtain an order for entering at the Record and Writ Clerks' Office a memorandum of the service upon any formal defendants of a copy of the bill, where the bill prays as against such defendants, that on being so served they may be bound by the proceedings, and where no appearance has been entered by such defendant. This order is obtained on motion in Court on an affidavit of service of the bill.

Cross proceedings by defendant.—At this point it will be convenient to advert to certain steps more or less frequently taken by the defendant as actor against the plaintiff in the ordinary course of the cause, previously to the hearing.

These are, (1.) Filing cross interrogatories.

(2.) Applying for production of documents.

(3.) Moving to dismiss the bill for want of prosecution.

(1.) *Filing cross interrogatories.*—The case of a defendant may depend for its support chiefly on facts lying within the knowledge of the plaintiff, and the defendant may feel satis-

(a) Consol. order xxi, rules 1, 5. (b) Order of Feb. 5, 1861, rule 21,

fied that the plaintiff would, upon being interrogated, be compelled to admit these facts. Under the old practice, the course in those cases was to file a cross bill for discovery. Now the defendant may, as soon as he has himself put in a sufficient answer, file in the Record and Writ Office interrogatories for the examination of the plaintiff, prefixing to such interrogatories a concise statement of the subjects on which a discovery is sought, and the plaintiff is bound to answer, and the defendant entitled to except in like manner as if the interrogatories had been filed in a suit for discovery (a).

(2.) *Production of documents*.—A defendant has also the right, as soon as, if required to answer, he has put in a full answer to the plaintiff's bill, of applying against the plaintiff for production of documents, in precisely the same way as already explained with respect to applications of this kind by the plaintiff against the defendant (b).

(3.) *Dismissal of bill for want of prosecution*.—Where a defendant finds that the plaintiff, either through want of confidence in his own case or for other reasons, fails to proceed with diligence, he may by motion to dismiss the bill for want of prosecution compel the plaintiff either to go on or to put an end to the suit altogether (c). The practice of the Court is so framed as to give a defendant a right in the event of unreasonable delay on the part of the plaintiff to move to dismiss at a certain time after each step in the cause.

It seems unnecessary to specify in detail all the various circumstances under which a defendant acquires this right to move to dismiss; the principal are,—

(a) Where the plaintiff does not within four weeks after the answer or the last of the answers is deemed

(a) 15 & 16 Vict. c. 86, s. 19. But where a company or corporation is plaintiff, the defendant cannot under this section file interrogatories for the examination of its officers when they are not parties; *Im-*

perial Credit Association v. Whit-
ham, L.R. 3 Eq. 89.

(b) 15 & 16 Vict. c. 86, s. 20.

(c) Consol. order xxxiii, rules 10—13.

sufficient, or after traversing note filed, either file replication, *or* set down cause on bill and answer,—*or* serve notice of motion for a decree, *or* proceed to amend (*a*).

(*β*) Where a plaintiff does not set down the cause to be heard, and serve *subpoena* to hear judgment within four weeks after the evidence is closed (*b*).

(*γ*) A defendant from whom no answer has been required may move to dismiss at the expiration of three months after appearance, unless the cause has been set down to be heard either on motion for decree or after replication (*c*).

Upon the hearing of a motion to dismiss, the Court generally declines entering upon any inquiry into the merits of the bill or of the defence (*d*). The points to be considered are simply : First, Is the defendant entitled in point of time to move to dismiss? Secondly, What excuse, if any, can the plaintiff give for his delay? In the most frequent case, namely that of a motion to dismiss made before replication filed, the common result of the motion is that the plaintiff is ordered to file a replication within a week, and to pay the defendant the costs of the motion. In default of filing a replication within the week the order proceeds to dismiss the bill with costs, to be paid by the plaintiff. If the plaintiff desires it, he will in most cases be allowed the same time to set down the cause on bill and answer, or to give a notice of motion for a decree instead of filing replication.

Exceptions for scandal.—Another proceeding, open alike to a plaintiff as to a defendant, viz., exceptions for scandal, by means of which portions of the pleadings or of the evi-

(*a*) Consol. order xxxiii, rule 10.

(*b*) Ibidem, rule 10.

(*c*) Ibidem, rule 13. The rule as altered by order of Nov. 22, 1866, runs as follows : ‘ Unless a notice of motion for a decree, or

‘decretal order shall have been served in the meantime, or the cause shall have been set down to be heard.’

(*d*) *Stagg v. Knowles*, 3 Hare, 241.

dence may be expunged and removed from the consideration of the Court, may be here mentioned. Scandal may be said generally to consist in the allegation of facts in unbecoming language, or in the allegation against a party or even a stranger to the cause of some crime or misdemeanor irrelevant to the matter in dispute.

The proper mode to be adopted by the person aggrieved in order to procure the removal of such allegation from the bill, answer, affidavit, or deposition in which it may occur, is by exceptions in writing, signed by counsel, describing the particular passages alleged to be scandalous, which exceptions must be filed with the Clerk of Records and Writs (a). Such exceptions are heard by the Judge to whose branch of the Court the cause is attached, in like manner as exceptions to an answer for insufficiency (b).

Impertinence.—The practice of excepting for impertinence, that is, the introduction of irrelevant matter into any written proceedings, has been abolished, but at the hearing of the cause application may be made to the Court that any party introducing impertinent matter into the proceedings may pay the costs occasioned thereby (c).

Hearing.—The order of the hearing may be generally stated thus :—

First the leading counsel for the plaintiff states the case. Then the plaintiff's evidence is heard and his documentary evidence put in, the junior counsel for the plaintiff is heard ; the statement of the leading counsel for the defendant, the defendant's evidence,⁷ and the argument of the defendant's junior counsel, follow next ; and if there are various sets of defendants, their counsel and evidence are heard and put in, in the order in which the defendants' names appear on the record, subject to the qualification, that the counsel for defendants who have the same interest as the plaintiff are

(a) Consol. order xvi, rule 2.

(b) 13 & 14 Vict. c. 35. s. 27.

(c) 15 & 16 Vict. c. 86, s. 17.

heard immediately after the plaintiff's counsel. The senior counsel for the plaintiff has the reply. The practice of the junior counsel on each side opening the pleadings is now seldom adopted.

Drawing up of decree.—The decree, whether made upon hearing on bill and answer, or upon motion for decree, or upon hearing after issue joined, is prepared by the Registrar from his own notes taken in Court and from the notes on the briefs of Counsel, and very frequently, from minutes prepared by Counsel for the plaintiff, and submitted to the Counsel for the defendants. The Registrar generally adopts (in substance) minutes agreed to by the Counsel for all parties.

Accounts and inquiries are numbered.—Where the decree directs accounts to be taken or inquiries to be made, each direction must be numbered so as to designate each distinct account or inquiry by a separate number (a).

The draft of the decree having been prepared by the Registrar, a copy of such draft is delivered to the solicitor having the carriage of the order, and copies of the mandatory part of the decree are delivered to the solicitors of the other parties. The draft is ultimately settled by the Registrar in the presence of such of the solicitors as attend. If the parties differ as to the draft decree, the Registrar commonly states the form in which he intends to settle the decree, unless otherwise directed by the Court, leaving it to any dissatisfied party to obtain permission if possible from the Court to allow the cause to be put in the paper to be spoken to, or to give formal notice of motion to vary the draft.

Passing and entering decree.—The form of the draft being settled, the decree is copied, passed by the Registrar on a day specially appointed for that purpose, and subsequently entered. The process of entry consists in making a copy of

(a) Consol. order xxiii, rule 15.

the decree in certain books kept under the direction of the Senior Registrar, which, when complete, are transmitted to and preserved in the Report office.

II.—PROCEEDINGS SUBSEQUENT TO DECREE AND DOWN TO THE FINAL ORDER.

Accounts and inquiries.—When the decree made at the original hearing is not final but directs accounts or inquiries, leaving the rights of the parties to be adjusted, or more completely adjusted, at the hearing of the cause on further consideration after the result of those accounts and inquiries shall have been ascertained, the prosecution of the accounts and inquiries directed by the decree takes place in the Chambers of the Judge to whose branch of the Court the cause is attached.

Proceedings in Chambers.—The first step taken by the party having the prosecution of the decree is to leave a copy thereof at the Judge's Chambers, with a note of the names of the solicitors for all the parties (*a*). A summons, which must be served two clear days before the return thereof, is then issued to proceed with the decree. At the return of this summons the first requisite is to satisfy the Judge, or his Chief Clerk, that all the persons who under the old practice were necessary parties to the bill, and who now in lieu of being made parties are to be served with notice of the decree, have been in fact so served (*b*), in reference to which it should be noticed that parties so served are entitled at

(*a*) Consol. order xxxv, rule 15; Aug. 8, 1857.
 Chamber Regulations 5 & 6 of (*b*) Consol. order xxxv, rule 16.

any time within one month after service to apply to the Court to add to the decree (a). This preliminary requisite being complied with, directions are given as to the prosecution of the accounts and inquiries, and where accounts are directed a time is usually fixed within which the accounting party must bring in his account. The account is subsequently brought in and verified by affidavit (b) and the items of discharge (except as regards items of less amount than 40s.) must be vouched. If any party is dissatisfied with the account, he may claim to have the accounting party examined *vivâ voce* in Chambers, but he must give him notice as to the points upon which he seeks to examine him.

Procedure and Evidence in Chambers.—In reference to the inquiries directed at Chambers, which are of a most miscellaneous kind, it may be observed that the proceedings are ordinarily conducted by the solicitors of the parties, but that in other respects the course of proceeding is generally the same as upon motions in Court. No states of facts, charges, or discharges are brought in. Copies, abstracts, or extracts of or from accounts, deeds, and documents are supplied for the use of the Judge and his Chief Clerk when required (c). The evidence upon which the investigation of the points directed to be inquired into proceeds, may be of all or some or one of the three following kinds:—1. The evidence in the cause entered into before the hearing. 2. Affidavits filed after the hearing. 3. The evidence of the parties and fresh witnesses taken before the Chief Clerk or the Examiner.

Chief Clerk.—The prosecution of accounts and inquiries in Chambers is, as a general rule, before the Chief Clerk, who refers to the Judge in cases of difficulty, but it is a matter of right with any suitor to have his case adjudicated upon by the Judge in person; and the Chief Clerk, upon the

(a) Consol. order xxiii, rule 18. (b) Consol. order xxxv, rule 33.

(c) *Ibidem*, rule 26.

request of any party appearing before him, adjourns the matter for hearing before the Judge himself.

Further accounts.—Where in the prosecution of the decree or order it appears to the Judge that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly.

Scandalous matter introduced into any statement, affidavit, or proceeding at Chambers, is brought to the notice of the Judge by taking out a summons, and upon the hearing of such summons is expunged (a).

Matters transacted in Chambers.—In addition to accounts and inquiries the various matters formerly transacted in the Masters' offices between the decree on the hearing and the order for further directions, are now prosecuted in Chambers. Thus the advertisements for creditors, legatees, heirs-at-law, and next of kin, the proof by creditors of their debts, the sale, realisation, and management of the real and personal estate to be administered in the suit, are all conducted at Chambers.

Advertisements.—In issuing advertisements (instead of issuing as under the old practice first a general, and then a peremptory advertisement), one form of advertisement only, and that peremptory, is issued, but it is repeated as many times, and in such papers, as may be thought expedient (b).

Proof by Creditors.—Creditors and other claimants coming in to prove under a decree enter their claims in a book kept in the Judge's Chambers called the "Claims Book," and give notice of their having done so, and of the affidavit filed in support of their claim, to the solicitors in the cause (c). The creditor or claimant is liable to be cross-examined upon his affidavit. So long as any claims remain undisposed of, so that the hearing of the claims stands adjourned, any claimant may come in as of course, provided he enters his claim and files his affidavit four clear days before the last

(a) Consol. order xxxv, rule 60.

(b) *Ibidem*, rule 35.

(c) *Ibidem* rule 38.

adjournment day, and provided no certificate of debts or claims has been made in the meantime (a); but subject to this exception no claim can be received after the time fixed by the advertisement for coming in has expired, unless with the leave of the Judge at Chambers obtained upon special application.

Cost of creditor coming in.—A creditor who establishes his debt in Chambers is entitled to his costs of doing so, and the costs are added to the debt. In the absence of special circumstances, a fixed sum (commonly 2*l.*) is allowed to the creditor as costs of proof. The Court will sometimes order a person who makes an unsuccessful claim as a creditor to pay costs.

Conveyancing Counsel of the Court.—In connexion with the transaction of business at Chambers the conveyancing counsel of the Court must be mentioned. Under the old practice previously to 1852, the masters, in the prosecution of the decrees referred to them, were in the habit of availing themselves of the professional assistance of conveyancing counsel approved by themselves.

Not less than six in number.—By the “Masters in Chancery Abolition Act,” 15 & 16 Vict. c. 80, the Lord Chancellor was empowered to appoint any number, not less than six, of conveyancing counsel then in actual practice, upon whose opinion the Court of Chancery or any Judge might act in the investigation of the title to, an estate, with a view to the investment of money in the purchase or on mortgage thereof, or in the settlement of a draft of a conveyance, mortgage, settlement, or other instrument (b).

Business distributed by “rota.”—In pursuance of this authority six conveyancing counsel have been appointed amongst whom the business from time to time referred by the Court or Judges is distributed, according to a secret rota (c),

(a) Consol. order xxxv, rule 41. (b) See ss. 40, 41.
(c) Consol. order ii, rules 1, 2.

and in the event of the conveyancing counsel in rotation being unable from illness or declining to accept any reference, the same is offered to the other conveyancing counsel in rotation according to their seniority at the bar (*a*).

In cases of sales under the direction of the Court the title is generally investigated by one of the conveyancing counsel, there being an enactment in the Equity Procedure Act of 1852, prescribing that course (*b*).

The other matters which are referred to the conveyancing counsel are generally in the discretion of the Judge.

Accountants, &c.—The Court has also the power under the same Act of availing itself of the assistance of accountants, merchants, engineers, actuaries, and other scientific persons, the better to enable itself to determine any matter at issue in any proceeding and to act upon the certificate of such persons (*c*).

Certificate.—The results of the accounts and proceedings in Chambers are embodied in a certificate made by the chief clerk (*d*), which is divided into paragraphs corresponding to the paragraphs in the decree, and which refers to the evidence upon which each result stated in the certificate is founded.

The draft of the certificate is first prepared and a copy furnished to the various solicitors attending the proceedings, and is settled in their presence.

Varying or discharging the certificate.—The certificate when settled by the chief clerk is signed by him, and after such signature any party may, within four clear days after signature, take out a summons to obtain the opinion of the Judge (*e*); should no party take out such summons the certificate is at the expiration of the term of four days submitted to the Judge for approval, and signed by him. After the certificate has been signed by the Judge and filed, it is

(*a*) Consol. order ii, rule 4.

(*b*) 15 & 16 Vict. c. 86, s. 56.

(*c*) 15 & 16 Vict. c. 80, s. 42.

(*d*) 15 & 16 Vict. c. 80, s. 32.

(*e*) Consol. order xxxv, rule 50.

binding on all parties unless discharged or varied either in Chambers or in open Court, and any application to discharge or vary the same must be made within eight clear days after the filing of the certificate (a). After these eight days have elapsed the certificate stands upon the same footing as a report by a Master under the old procedure, after absolute confirmation, and can only be discharged or varied upon special grounds.

Setting down cause on further consideration.—After the expiration of the eight days from the filing of the certificate, the cause may be set down by the Registrar on the written request of the solicitor of the party having the conduct of the proceedings; and after the expiration of fourteen days from the filing, it may be so set down on the request of the solicitor for any party, but the cause cannot come into the paper until after the expiration of ten days from the time of its being set down. And the solicitor setting down the cause must give notice of its being set down at least six days before the day on which it can come into the paper (b).

Summons to vary certificate.—When a summons is taken out or notice of motion given to discharge or vary the certificate after it has been approved by the Judge, and the final determination of the questions in dispute in reference to the certificate will enable the Court to dispose of the cause generally, the common practice is to set down the summons or motion for hearing, together with the hearing of the cause on further consideration (similarly to the old practice of setting down the exceptions to the Master's report, with the hearing on further directions), and then, upon the whole matter coming on to be heard in Court, the order on further consideration is pronounced.

(a) Consol. order xxxv, rule 52.

(b) Consol. order xxi rule 10.

III.—SPECIAL PRACTICE IN CERTAIN PARTICULAR KINDS OF SUITS AND PROCEEDINGS.

Under this head may be mentioned—

- (1.) The procedure by summons originating in Chambers.
- (2.) That by special case.
- (3.) Foreclosure and redemption suits.
- (4.) Partition suits.
- (5.) Bills to perpetuate testimony.

(1.) *The Procedure by Summons.*

Administration decree upon summons.—Any creditor, or specific or residuary legatee under a will, and any one of the next of kin of a deceased person, may obtain, as of course, a summons from the Master of the Rolls, or any of the Vice-Chancellors, requiring the executors or administrators, as the case may be, of the deceased to attend before him at Chambers, and show cause why an order should not be granted for the administration of the personal estate of the deceased (a). The summons being in this case an original proceeding, the rules of the Court provide that a duplicate (which thus takes the place of the bill) shall be filed at the office of Records and Writs, and appearances are entered by the parties served (b). There must be an interval of seven clear days (instead of two, as where the summons is taken out in an existing cause) between the service of the summons and the return thereof (c). Upon the summons coming on

(a) 15 & 16 Vict. c. 86, s. 45.

(b) Consol. order xxxv, rule 6.

(c) *Ibidem*, rule 7.

to be heard, unless it appears that there are circumstances of complication connected with the claim of the plaintiff, or with the administration of the estate, the Judge at Chambers, upon the hearing of the summons, makes the common decree for the administration of the personal estate of the deceased.

Distinction as to real estate.—As regards real estate, any creditor or person interested under the will of a deceased person may obtain summarily by summons an order for the administration of his real estate, but only in cases where the *whole* of the real estate is by devise vested in trustees who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and profits and produce of sale (a). The power of making an administration decree of real estate upon summons does not apply where there is an intestacy, nor where under the will the real estate goes to different persons; the intention being that the special jurisdiction should operate only where the real estate is vested in some person or persons having with respect thereto powers and duties as extensive, or nearly so, as those which the law itself confers upon executors and administrators.

Proceeding applicable only to simple cases.—This proceeding by way of summons is, as has been stated, only applicable to simple cases, and as a general rule the only decree made thereupon will be the common decree for administration.

Thus, if it is desired to charge an executor with wilful neglect or default, the proper course is to file a bill.

Subsequent procedure.—After decree made upon summons, the proceedings at Chambers are the same as if the decree had been made upon bill filed. The further consideration is brought on by summons, and where any question arises, or

(a) 15 & 16 Vict. c. 86, s. 47. This enactment has been literally construed in favour of the jurisdic-

tion by summons. See *Colman v. Turner*, L.R. 10 Eq. 230; *De la Salle v. Moorat*, L.R. 11 Eq. 8.

is likely to arise, which is considered proper for the decision of the Court, is adjourned for hearing into open Court ; but in many cases the order on further consideration is made in Chambers.

The procedure for obtaining an administration decree by summons is extensively resorted to.

Sir George Turner's Act.—The general procedure as above explained is, however, not applicable where an executor or administrator is desirous of having the estate of his testator or intestate administered under the direction of the Court at Chambers without the expense of a formal suit, and no one is willing to take out an administration summons against him. He has, under that procedure, no power of taking the initiative. The special provisions of Sir George Turner's Act 13 & 14 Vict. c. 35, as subsequently extended, enable him, however, by summary procedure at Chambers, to obtain, not indeed a complete administration of the estate, but a protection against all latent debts and liabilities of his testator or intestate.

By section 19 of that Act, after reciting that it was expedient to provide means for enabling executors or administrators of deceased persons to ascertain whether there were any outstanding debts or liabilities affecting the personal estates of such persons without the delay and expense of suits to administer such estates, it was enacted, that it should be lawful for the said Court upon the application of the executors or administrators of any deceased person, by order to be made upon motion or petition of course, and to be in the form or to the effect set forth in the schedule thereto, with such variations as circumstances might require, to refer it to one of the Masters of the said Court to take an account of the debts and liabilities affecting the personal estate of such deceased person, and to report thereon ; provided always, that no such order should be made until the expiration of one year next after the death of such deceased person, or pending any proceedings to administer the estate

of such person, and that in case at any time after the making of such order any decree or order for administering the estate of such deceased person should be made, it should be lawful for the said Court, by such decree or order, to stay or suspend the proceedings under such order of course, on such terms and conditions, if any, as to the said Court should seem just. And by subsequent sections of the Act provision is made for proceedings consequential upon the said order, and for indemnifying executors and administrators who avail themselves of the Act against debts and liabilities other than those established under the said order.

The jurisdiction conferred by the foregoing Act has been enlarged by the 23 & 24 Vict. c. 38, s. 14, which enacts that the order may be made immediately or at any time after probate or letters of administration shall have been granted, and that such order may be made either by the Court of Chancery upon motion or petition of course, or by a Judge of the said Court sitting at Chambers, upon a summons in the form used for originating proceedings at Chambers, and that after any such order shall have been made the said Court or Judge may, upon the application of the executors or administrators, by motion or summons restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said Court or Judge shall seem just.

Original proceedings for guardian and maintenance.—The procedure by summons, by way of original proceeding, is also adopted in applications relating to the guardianship and maintenance of infants. Applications as to the appointment of guardians for infants, and the maintenance of infants, are very frequently made by way of interlocutory

applications in an existing suit, and when so made they fall under the class of interlocutory applications ; but the applications intended to be here referred to, are those made without suit, and in exercise, so to speak, of the old Chancery procedure as recently modified. According to this old procedure, the Court was in the habit, upon a petition being presented, entitled in the matter of the infant, to make an order referring it to the Master to appoint a guardian, and to inquire as to maintenance, provided it considered the property of the infant to be not sufficiently large to warrant the more formal procedure by bill. The limiting value of property requisite to induce the Court to exercise the summary jurisdiction under the old procedure, was never distinctly defined, and the tendency of the more modern practice was towards an extension of the jurisdiction (*a*).

Under the present practice this summary jurisdiction is exercised at Chambers upon a summons, entitled (as the old petition was) in the matter of the infant.

As the proceedings in this case originate in Chambers, the rules as to filing the summons and entering appearances, before referred to (*b*), apply equally here.

Summons cannot be served out of jurisdiction.—It should be observed with respect to proceedings originating at Chambers generally, that the Court has no power to order service of a summons out of the jurisdiction (*c*).

(2.) *Procedure by Special Case.*

This species of procedure applies only where there being no dispute as to facts, it is desired to obtain the opinion of the Court upon some question or questions of law.

(*a*) See *In Re Christie*, 9 Sim. 643 ; *Ex parte Angell*, 13 Sim. 258

(*b*) See p. xxxvi, *ante*.

(*c*) But see now *Re Alcan*, 1 De Gex, Jones and Smith, 398, reversing *Lester v. Bond*, 1 Drewry & Smale, 394.

Cases to which this form of proceeding applies.—The general nature of the cases to which it applies cannot be better stated than in the words of the Act (13 & 14 Vict. c. 35), which enacts “That it shall be lawful for persons interested or claiming to be interested in any question cognizable in the Court of Chancery, as to the construction of any Act of Parliament, will, deed, or other instrument in writing, or any article, clause, matter, or thing therein contained, or as to the title or evidence of title to any real or personal estate contracted to be sold or otherwise dealt with, or as to the parties, or to the form of any deed or instrument for carrying any such contract into effect, or as to any other matter falling within the original jurisdiction of the said Court, as a court of equity, or made subject to the jurisdiction or authority of the said Court by any statute, not being one of the statutes relating to bankrupts, and including among such persons all lunatics, married women, and infants, in the manner and under the restrictions hereinafter contained, to concur in stating such question in the form of a special case for the opinion of the said Court, and it shall be lawful for all executors, administrators, and trustees to concur in such case.”

Form of special case.—In form the special case much resembles a bill. It is entitled as a cause between some or one of the parties interested as plaintiffs or plaintiff, and the others as defendants (*a*), and states the facts requisite for obtaining the judgment of the Court; the questions submitted for the opinion of the Court occupying a position analogous to that of the prayer of the bill (*b*). The case is, however, not printed but written. It is filed in the same way as a bill, and appearances are entered by the parties thereto (*c*), and upon appearance all parties not under disability are bound by the statements therein (*d*).

(*a*) 13 & 14 Vict. c. 35, s. 7.

(*b*) The case must be signed by counsel for all parties, defendants as well as plaintiffs; but if thought

fit, the same counsel may sign on behalf of all the parties.

(*c*) 13 & 14 Vict. c. 35, s. 10.

(*d*) *Ibidem*, s. 11.

Provisions as to parties under disability.—For the protection of persons who are under disability, it is necessary where any such are parties to the case, that a special application should be made in open Court for leave to set down the case for hearing, and in many cases supported by affidavit and other evidence as to the truth of the statements contained in the case (a). As soon as the case is set down it takes its place in the cause list with the general causes. Upon the hearing of the special case the Court may refer to the whole contents of the documents stated in the special case (b).

Effect and operation of the decision.—The enactment determining the effect and operation of the decision of the Court in special cases is as follows (c):—"That it shall be lawful for the said Court, upon the hearing of any such special case as aforesaid, to determine the questions raised therein, or any of them, and by decree to declare its opinion thereon, and, so far as the case shall admit of the same, upon the right involved therein, without proceeding to administer any relief consequent upon such declaration; and that every such declaration of the said Court contained in any such decree shall have the same force and effect as such declaration would have had, and shall be binding to the same extent as such declaration would have been, if contained in a decree made in a suit between the same parties instituted by bill."

If upon the hearing of the special case the Court is of opinion that the questions raised thereby, or any of them, cannot properly be decided upon such case, the Court may refuse to decide the same.

The procedure by special case has been far less resorted to of late than it was at first after the passing of the Act which introduced it.

(a) 13 & 14 Vict. c. 35, s. 13.

(b) *Ibidem*, s. 8.

(c) *Ibidem*, s. 14.

(3.) *Foreclosure and Redemption Suits.*

The practice in foreclosure and redemption suits in the English Court of Chancery differs not merely in its general procedure from that which obtains in ordinary Irish Chancery suits, but specifically from the Irish practice in suits of a similar kind, and demands therefore a special notice (a).

Parties.—As regards parties the rule is, that a mortgagee filing a bill for foreclosure must make all persons who fill the character of mortgagees subsequent to himself, or who are interested in the equity of redemption, defendants. If, however, the plaintiff is a second or subsequent mortgagee, he is not obliged to make the first mortgagee, or prior incumbrancers (as the case may be) parties.

Form of relief in foreclosure suit.—The explanation of the rule is found in the relief commonly afforded by the Court on a bill of foreclosure, which is as follows :—An account is taken of what is due to the plaintiff for principal, interest, and costs, computing the interest prospectively for six months from the date of the certificate, and the next (or second) incumbrancer must redeem at the expiration of the six months or be foreclosed. If he does not then redeem, three months further time is given to the next (or third) incumbrancer, and so on throughout the whole chain of incumbrancers. If the second incumbrancer *do* redeem, an account is then taken of the subsequent interest on what he has paid to the first incumbrancer, and of the principal, interest, and costs on his own security, and the third incumbrancer must pay the aggregate amount so found due within three months from the date of certificate or be foreclosed, and so on throughout the whole chain of incumbrancers.

Prior mortgagee not interested in foreclosure suit by a puisné mortgagee.—It results from this practice that the estate itself

(a) See note (a) p. i, *ante*.

not being in any way dealt with and only the incumbrancers subsequent to the plaintiff redeeming or being foreclosed, whatever takes place in a foreclosure suit by a *puisé* mortgagee cannot affect incumbrancers who take paramount to him, and consequently such incumbrancers are not necessary parties (a). The plaintiff may, if he think fit, make prior incumbrancers parties, but if he do so the bill as against them is a bill to redeem.

Secus in the case of a redemption suit.—On the other hand, to *redemption suits* by an intermediate incumbrancer, where the same principle of successive accounts and redemptions forms the guide to the decree, all the incumbrancers, whether prior or subsequent to the plaintiff, must be made parties: the prior incumbrancers, because it is against them that the particular relief prayed, “redemption,” is sought; the subsequent incumbrancers, because the prior incumbrancers are entitled to have the accounts taken in the presence of all parties interested, and either to be redeemed or to have a complete decree of foreclosure barring not merely the plaintiff, but all the incumbrancers who come after him (b).

If the plaintiff, in a bill either to redeem simply or to redeem prior and foreclose subsequent incumbrancers, fail himself to redeem, his bill is dismissed with costs, and this dismissal operates as a foreclosure, which precludes his filing a subsequent bill to redeem.

Decrees very complicated.—Decrees in foreclosure and redemption suits, especially where more than one subject-matter is included in one or more of the mortgage deeds, are frequently extremely complicated and give rise to great difficulties; and where there is any doubt as to the order of the priority of the various incumbrances, it is impossible

(a) *Rose v. Page*, 2 Sim. 471; 466; *Anderson v. Stather*, 2 Coll. Richards v. Cooper, 5 Beav. 304. C.C. 209.

(b) See *Farmer v. Curtis*, 2 Sim.

to frame a complete decree until the priorities are ascertained.

Reference to ascertain priorities the first step. Statutory power of sale.—In these cases the first step is an inquiry to ascertain the priorities, in the prosecution of which inquiry points of law and equity of extreme nicety (as for instance, questions of tacking) often arise, and in this way a plaintiff, who is without dispute the first mortgagee, may be delayed in obtaining a decree merely by reason of difficulties in adjusting the priorities *inter se* of incumbrancers who all take subject to his first mortgage.

Statutory power of sale.—In such a case, and others in which the ordinary foreclosure decree would be undesirable, a partial remedy is afforded by the Equity Procedure Act of 1852, s. 48, which enacts, "That it shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct, and if the Court shall so think fit, without previously determining the priorities of incumbrances or giving the usual or any time to redeem."

The Act proceeds to provide that where the request for sale is made by a subsequent incumbrancer, or the mortgagor, and the first mortgagee shall not consent, a sale shall be directed only upon the party who requests it paying such deposit and submitting to such terms as the Court may impose.

Principle on which Court directs or refuses a sale.—In exercising this new statutory discretion the Court takes into consideration the interests of all who have claims on the mortgaged property. Complication is generally a strong inducement to direct a sale. When the first mortgagee

opposes, the Court will generally require the party who prays a sale to deposit a sufficient sum to cover the probable costs in the event of the property not being sold; and it has sometimes imposed as a term, that the reserved bidding should be not less than the amount due to the opposing first mortgagee.

Cases where infants interested, or mortgagor dead.—In certain cases, *e. g.*, where infants were interested in the property, or where the mortgagor was dead, and it became necessary to administer his estate, the Court was always in the habit of directing a sale under its general procedure, and this practice still prevails (*a*).

Cases of equitable mortgage, &c.—The foregoing observations must be viewed as proceeding upon the assumption that the security is a formal mortgage and not a mere equitable mortgage by deposit, and that the subject-matter mortgaged is real estate. In cases of equitable mortgages of real estate it is perhaps still unsettled whether the proper decree is for sale, or for foreclosure (*b*). Where the subject-matter mortgaged consists of personal property, such as stock, railway shares, or furniture or other personal chattels, the decisions point to the conclusion that the mortgagee may, at his option, claim a decree either of sale or foreclosure (*c*).

Costs.—In respect to costs, it may be said generally that where a sale is decreed in lieu of foreclosure, each mortgagee adds his costs to his mortgage debt, and is paid his entire principal, interest, and costs in priority to all mortgagees whose securities rank after his own; the proceeds of the sale being treated as standing strictly in the place of the mortgaged property.

(*a*) The Court will make a decree for foreclosure, even against an infant heir, if it be clearly for his benefit; *Croxon v. Lever*, 3 New R. 238.

(*b*) See *Tuckley v. Thompson*, 1 Johns. & Hem. 126. Where the deposit is accompanied by a memo-

randum stipulating for a legal mortgage, the proper remedy is obviously foreclosure and conveyance of the legal estate; *Underwood v. Joyce*, 7 Jurist, N. S. 566.

(*c*) See *Wayne v. Hanham*, 9 Hare, 62.

(4.) *Partition Suits.*

The proceedings in partition suits in reference to issuing of commission, mode of dealing with costs, and otherwise are generally the same in England as in Ireland, but the practice which has recently been introduced into the English Courts of dealing with questions of partition without a commission requires notice.

The new practice is to pronounce a decree declaring in the usual form the rights to a partition, but instead of going on to direct a commission, the decree proceeds to direct that proposals for a partition be laid before the Judge for his approval (*a*). Subsequently, upon proceeding with the decree in Chambers valuations and affidavits are laid before the Judge, and the scheme of partition is approved by him at once without the intermediate expenses of a commission.

The Court has even gone further than this, and has at the hearing decreed a partition in accordance with an apportionment made by surveyors (*b*).

(5.) *Bills to perpetuate Testimony.*

Original practice of Court.—According to the practice of the Court, independently of recent legislative enactment, where a person entitled presumptively to some future interest in *property* finds his title is likely to be impeached, and the testimony upon which his title depends is in danger of being lost through death or mental incompetency of witnesses, he may file a bill against all persons interested in disputing his title, praying that witnesses may be examined respecting the point in controversy, and that the evidence may be perpetuated for the benefit of himself and those claiming under him.

(*a*) *Clarke v. Clayton*, 2 Giff. 333.

(*b*) *Greenwood v. Percy*, 26 Beav. 572. Since the Partition Act, 1868 (31 & 32 Vict. c. 40) as to

which see *ante*, p. 162, note (*a*); a large proportion of the Partition suits instituted result in a sale under that Act.

The original jurisdiction of the Court in this respect (which was held not to apply to the case of a disputed dignity or office, nor to a mere *spes successionis*) was considerably extended by the 5 & 6 Vict. c. 69.

This Act provided in substance that any person who would, under the circumstances alleged by him to exist, become entitled *upon the happening of any future event* to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which could not by him be brought to trial before the happening of such event, should be entitled from and after the passing of that Act to file a bill in the High Court of Chancery to perpetuate any testimony which might be material for establishing such claim or right.

The Act provides for making the Attorney-General a defendant to all suits instituted under the authority of the Act, touching any honour, title, or dignity, or any other matter in which the Crown may be interested.

Peculiarities of the kind of suit.—The practice under this head of jurisdiction presents the following peculiarities:—The bill is never brought to a hearing, there being no question to be decided; and if it be not duly prosecuted, the proper motion on the part of the defendant is, not to move to dismiss for want of prosecution, but to move that the plaintiff do proceed within a given time, or pay the defendant his costs (*a*).

How evidence taken.—According to the old practice, the evidence was taken by deposition upon interrogatories before the Examiner alone, and could not regularly be known by the parties at the time; but it is now taken in the mode prescribed by the practice introduced in 1852, *i.e.*, by examination and cross-examination before the Examiner in the presence of the parties, their counsel, or solicitor, and

(*a*) See *Ellice v. Roupell* (No. 2), 32 Beav. 308; *Earl Spencer v. Peck*, L. R. 3 Eq. 415.

the depositions, though necessarily known to both parties, are not available unless by the death of the witness or otherwise; his evidence cannot be obtained at the time when litigation actually arises.

Costs.—As to costs, the practice seems to be that a defendant who merely cross-examines the witnesses of the plaintiff is entitled to be paid his costs of suit by the plaintiff; but that if a defendant avails himself of the bill to perpetuate testimony in his own favour, and examines witnesses himself, he must pay his own costs.

IV.—INTERLOCUTORY APPLICATIONS.

Interlocutory applications of various kinds may be made in a pending suit by either a plaintiff or defendant, and in many cases by persons not parties to the suit. The procedure in this case is by (1)—motion, (2)—petition, or (3)—summons at Chambers.

1. *Motions.*—Where a party proceeds by motion, unless the case be one entitling him to move *ex parte*, he serves the other parties in the cause (commonly by their solicitors) with a notice entitled in the cause, specifying the day on which the Court will be moved, the Judge before whom the motion is intended to be made, and the terms of the order which the Court will be asked to make. This notice must be given sufficiently early to allow at least two clear days between the time of its service and the time of the motion being heard, *e.g.*, a notice of a motion for a Thursday must be given before the close of office hours (7 p.m.) on Monday (*a*). However, in pressing cases the Court, on an *ex parte* application by the party wishing to move, will allow the ordinary time of service to be abridged, or, as the phrase is, give

(*a*) Consol. order xxiii, rule 2.

leave to serve short notice of motion. Where short notice is given the notice must state that it is given by leave of the Court, otherwise the parties against whom the motion is made may disregard the notice, appearing as it does on the face of it to be irregular in point of time. The evidence in support of a motion is by affidavit. The party moving files affidavits immediately after giving his notice of motion, or if he has filed them previously, or wishes upon the hearing of the motion to use any other affidavits filed previously to the date of the notice, he commonly specifies them at the foot of the notice of motion, the rule being that the party opposing the motion is not bound to search for affidavits further back than the date of the notice. The general practice imposes no restriction with respect to the time within which affidavits must be filed. The person moving may file affidavits at any time until the motion is actually heard. The practical result of this rule as to affidavit-evidence is that the hearing of a contested motion is often frequently deferred. Upon the counsel for the moving party proceeding to make the motion, some one of the counsel on the other side states that affidavits in support of the motion have very recently been filed, and that his client requires time to answer them, and time is given ; or else, just as counsel is about to open the motion, he is told that one of his opponents has filed affidavits, perhaps that very morning, too long to admit of an immediate decision as to the necessity for answering them, and he is obliged to defer moving in order to gain time for further consideration. Theoretically, a motion may thus stand over from time to time until both sides have exhausted themselves in affidavits. Practically, the delay is lessened by conditions imposed by the Court when the motion is mentioned ; as, for instance, that the party opposing the motion shall file his affidavits by a certain day, and that the party moving shall file his affidavits (if any) in reply by a certain subsequent day ; though, even where such

directions are given, it is difficult to shut out material evidence solely on the ground of its not having been adduced in time. Each party has the right of cross-examining his opponent's affidavit-witnesses orally before the Examiner, in the presence of the parties, their counsel and solicitors ; and this right is very frequently exercised.

Order of hearing motions.—The order in which a motion is heard depends upon the precedence at the bar of the counsel moving. Certain days are set apart by the practice of the Court for hearing motions. Commonly the first and last days of term, and every Thursday in term, are motion days. In the sittings out of term, days, called seal days, are specially fixed on which motions are taken. Motions are ordinarily heard as follows :—The Queen's counsel, being called on by the Judge, in turn, in order of their precedence, bring on the motions they have to make (each counsel being restricted to two opposed motions, after making which, the right of moving passes to the next counsel in standing), and then the barristers of the outer bar (subject to a similar restriction as respects number of motions) move according to their precedence. No list of motions is ordinarily made out. Any motions undisposed of at the close of the day allotted to this description of business, must go over until the next motion or seal day, unless the Court thinks it right to hear them sooner, and, for that purpose, to postpone the general business of the Court ; but a motion so necessarily standing over has no right of precedence over new motions of which notice may be given in time for the next motion or seal day.

Hearing of motions.—The mode in which motions are heard when actually brought on is similar to that of the hearing of a cause. A party dissatisfied either with the refusal of a motion or with the order made thereon, and desiring to appeal, does so by renewing the motion before the Court of Appeal, or moving that the order made may be

discharged. Appeal motions are placed in a list, and are heard according to the order in which they there appear. New evidence is generally admissible upon the hearing of the appeal motion ; and the hearing of the appeal is conducted in the same mode as that of the original motion.

2. *Petitions*.—Petitions presented in existing causes differ little in form from a bill. The title of the petition is the same as the title of the cause in which it is presented. If it relates to more causes than one it must be entitled in all the causes. If the cause to which it relates is attached to the Rolls Court, it is addressed to the Master of the Rolls himself (and not to the Lord Chancellor, as in the case of a bill marked for the Rolls Court) ; but if the cause is attached to the Court of a Vice-Chancellor, the address is to the Lord Chancellor. The mode of statement usually differs little from that in a bill, and the practice of dividing the statements into paragraphs numbered consecutively, though not compulsory, as in the case of bills, has been generally adopted with respect to petitions. At the foot of the prayer of the petition a note is added (analogous to the note at the foot of the bill, which gives the defendants' names), stating the persons who are intended to be served with the petition (*a*). The petition, however, is not filed in the first instance (as in the case of a bill), but is presented to the Lord Chancellor or Master of the Rolls, as the case may be, by leaving the same with his Secretary. The Secretary writes in the margin of the petition, "The Lord Chancellor (*or Master of the Rolls*) doth order that all parties do attend him hereon on [*the day and date of month*] ; hereof give notice forthwith ;" which memorandum is technically called the answer to the petition. As soon as the petition has been answered, service is effected by the delivery of copies of the petition, and answer thereon, to the parties to be served or their solicitors ; and (as in the case of motions) there must be two clear days between the

(*a*) Consol. order xxxiv, rule 1.

service and the day of hearing (a). The evidence in support of the petition is given by affidavit, as on motions, and where a petition is opposed, the practice as to allowing it to stand over for the purpose of completing the evidence approximates closely to that before mentioned with regard to opposed motions.

Order of hearing.—In each branch of the court a day in each week in which the Court is sitting is generally allotted for the hearing of petitions, and the petitions to be heard having been placed in a list, according to the order of their presentation, are called on in turn accordingly. Precedence is in the first instance generally given to unopposed petitions. Should any petitions remain undisposed of at the end of the petition day, they go into an adjourned list, preserving their original order, and are taken generally on the next petition day, in priority to the opposed petitions in the new list. The mode of hearing petitions has no peculiarity. After the Court has pronounced its order, the *original petition* and the counsel's brief are left with the Registrar, to enable him to draw up the order, and before the order is actually passed the original petition is filed in the Report Office, where it thenceforward remains.

Affidavit of service.—If on the hearing of a motion or petition the respondent fails to appear, the order is not, generally speaking, granted without proof by affidavit of the notice of motion or the petition, as the case may be, being duly served on the non-appearing party.

3. *Summons.*—The procedure by summons in an existing suit, for the purpose of obtaining some interlocutory direction from the Judge, is the same in substance as that already explained in reference to proceedings in chambers after decree.

Applications upon summons are heard in order, according to a list affixed at the Judge's chambers.

The different classes of interlocutory applications to which

(a) Consol. order xxxiv, rule 2.

the foregoing modes of procedure are respectively applicable cannot be accurately distinguished.

The proceeding by summons is generally adopted on applications for time to plead answer or demur, for leave to amend bills, for enlarging time, for closing evidence, and for production of documents, applications relating to the conduct of suits or matters, or to the guardianship, maintenance, or advancement of infants, or relating to matters connected with the management of property, for payment into Court of purchase monies under sales by order of the Court and investing the same, and in applications for payment to any person of dividends or interest of stocks, funds, or securities standing to the separate account of such person. Summonses at Chambers are frequently adjourned into Court, where they are disposed of in the same manner as motions. In some of the Courts adjourned summonses are placed on a list and heard on particular days, in others they are brought on by counsel moving in their turn on the ordinary motion days.

Applications by motion or petition are made where it is considered necessary or advisable to apply to the Court itself rather than to the Judge sitting in chambers. In such cases a motion is generally adopted where no detailed written statement of documents, facts, or circumstances is considered requisite to be brought before the Court. If such a detailed statement is considered necessary, the application is ordinarily by petition.

Thus applications for an injunction or receiver are commonly made by motion, and though in such a case the notice of motion conveys no information except that the plaintiff asks the Court to make the order applied for, the bill upon which the motion is founded contains a full statement of facts, and prays, among other things, the injunction or receiver sought. On the other hand, an application for the compromise of a suit, or for payment of money out of Court,

is commonly made by petition, being grounded on documents or facts not previously stated to the Court in a consecutive form, or not so stated with reference to the particular object in view.

It may perhaps be said that strictly interlocutory applications to the Court itself, that is, applications between the commencement of a suit and the decree, are more generally made by motion, and that applications after decree are more generally made by petition.

V.—REVIVOR AND SUPPLEMENT.

Order of revivor.—Under the old practice of the Court, where a suit abated or became defective by the death or marriage of a party, or by a transmission of interest, or otherwise, a bill of revivor or of supplement was necessary. Under the Act of 1852 (15 & 16 Vict. c. 86), the procedure has been greatly simplified. The material section of the Statute in reference to this point (a) enacts, that upon any suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill, in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings : but an order to the effect of the usual order to revive, or of the usual supplemental decree, may be obtained, as, of course, upon an allegation of the abatement of such suit, or of the same having become defective and of the change or transmission of interest or liability ; and an order so obtained when served upon the party or

(a) Sect. 52.

parties who, according to the present practice of the said Court, would be defendant or defendants to the bill of revivor or supplemental bill, shall, from the time of such service, be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the previously existing practice of the said Court: and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the Office of the Clerks of Records and Writs, within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him.

Party may move to discharge.—Any party served may, within twelve days after service, apply to the Court to discharge the order on any ground which would have been open to him on a bill of revivor or supplemental bill (a); and when the party served is under any disability (other than coverture), the twelve days for moving to discharge run only from the time of the appointment of a guardian *ad litem* for such party (b).

Facts occurring after bill filed may be stated by amendment.—The frequent necessity which existed under the old practice of filing supplemental bills for the purpose merely of bringing before the Court facts which had occurred subsequently to bill filed, was remedied by the same Act, which (c) authorizes the introduction by way of amendment into the original bill of complaint of facts and circumstances which may have occurred since the institution of the suit, provided the cause is otherwise in such a state as to allow of an amendment being made in the bill.

Supplemental statement.—If the cause is not in a state to allow of amendment, and the plaintiff desires to put in issue facts or circumstances which have occurred since the filing of the bill, he may do so by filing in the Record and Writ Office

(a) Consol. order xxxii, rule 1.

(b) Ibidem.

(c) Sect. 53.

a supplemental statement (a) either printed or written to be annexed to the bill.

This power of filing a supplemental statement is, however, not often resorted to, for no cause can be said to be in a state not allowing amendment until at all events replication is filed, and even after replication filed, leave might, in most cases, be obtained to withdraw replication and amend the bill.

VI.—ENFORCING DECREES AND ORDERS.

The procedure of the Court for enforcing decrees and orders may be classed under two heads (b).

First. The old procedure, as amended and simplified, commencing with a writ of attachment, and, if necessary, followed by a Serjeant-at-arms or a writ of sequestration, or both, which is applicable to decrees and orders generally. In the particular case of an order to deliver up possession of lands the order may be enforced, not only by attachment, but by a writ of assistance.

Secondly. The new procedure by *fiery facias* and *elegit* and charging order, introduced in pursuance of the provisions of the Act for abolishing Arrest on Mesne Process (1 & 2 Vict. c. 110).

(a) Consol order xxxii, rule 2.

(b) This procedure has been materially altered by general order, dated January 7, 1870 made in pursuance of "The Debtors Act, 1869" the object of which Act was, in effect, to abolish imprisonment for debt. Attachment for non-payment of money or costs is therefore now no longer part of the process of the plaintiff, except where a

trustee or person acting in a fiduciary capacity is ordered to pay money in his possession or under his control (as to which see *Middleton v. Chichester*, L. R. 6 Ch. App. 152): or where a solicitor is ordered to pay costs for misconduct, or a sum of money in his character of an officer of the Court (as to which see *In Re Hope*, L. R. 7 Ch. App. 523).

Old procedure.—The old or ordinary procedure of the Court is available for the purpose of enforcing obedience to any direction contained in a decree or order, and there is no longer any distinction between enforcing a decree or order in favour of or against a party, or a person not a party (*a*). The first step now is service of a copy of the decree or order, which directs the payment of any money or the doing of any act, within a limited time, upon the person who is thereby ordered to make the payment or do the act, and no demand is now necessary (*b*). The copy served must have endorsed thereon words to the following effect :—“ If you the within-named A.B. neglect to obey this decree (*or* order), by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery, or by the Serjeant-at-arms attending the same Court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same decree (*or* order)” (*c*). The service must be personal, unless it be shown by affidavit that the party to be served is purposely keeping out of the way, in which case the Court will order service to be substituted on the solicitor or other agent of the person sought to be served. The subsequent process is in accordance with the warning given by the endorsement. In default of compliance a writ of attachment issues against the disobedient person, which writ is entrusted to the Sheriff for execution, and is not bailable. If the person attached is taken and detained in custody, and still remains disobedient, or if the Sheriff returns *non est inventus* to the writ of attachment, then the person prosecuting the decree is entitled to a commission of sequestration ; or in the latter event (*viz.*, the

(*a*) Consol. order xxix, rule 2.

(*b*) Consol. order xxix, rule 1.

(*c*) Consol. order xxiii, rule 10.

By the general order of Jan. 7, 1870, the indorsement is varied, and now runs as follows, “ You will be

“ liable to have your property se-
 “ questered for the purpose of com-
 “ pelling you to obey the same
 “ decree (*or* order) and you may
 “ also be liable to be arrested and
 “ committed to prison.”

return by the Sheriff of *non est inventus*) he may, if he so prefer, obtain an order for the Serjeant-at-arms, and so make one more attempt to enforce obedience by obtaining the control over the body of the disobedient person before issuing a sequestration against his property (a).

Form of sequestration.—The process of sequestration is in the form of a commission to certain persons (nominees in fact of the person prosecuting the decree or order, but technically officers of the court), authorizing them to enter upon the real estate of the disobedient person, and to collect, receive, and sequester, not only all the rents and profits of his real estate, but also all his goods, chattels, and personal estate, and commanding them to detain and keep the rents, and profits, and personal estate, until compliance and contempt cleared.

Writ of Assistance.—Where a decree or order is made for delivering possession of any lands, and such decree or order is after due service disobeyed, the party prosecuting such decree or order is entitled to sue out a writ of assistance, which is directed to the Sheriff of the county in which the lands are situate, and orders him to eject the person who has been ordered to deliver up possession, and put into possession him to whom possession has been ordered to be delivered (b). The writ, in fact, corresponds very closely to the writ of "*Habere facias possessionem*," under which possession is obtained at common law after recovery in an action of ejectment.

Writ of Fieri Facias and Elegit.—Secondly. The writs of *feri facias* and *elegit* (and *feri facias de bonis ecclesiasticis*) are

(a) Consol. order xxix, rule 3. This rule is now abrogated by general order of Jan. 7, 1870 (rule 2), and under rule 3, where a person is ordered to pay money or costs and after service refuses or neglects so to do, a sequestration issues without special order upon production of evidence to the same effect

as that required under the old practice on issuing a writ of attachment in default of payment. By rule 6 of the general order of Jan. 7, 1870, the provisions of Consol. order xxix, rule 3, are restored, *except as to payment of money or costs.*

(b) Consol. order xxix, rule 5.

close copies of the similar writs at common law. When a decree or order contains a direction for the payment of money or costs within a limited time, by a particular person to another person, the person to whom the payment is directed to be made may (without any previous service of the decree or order, unless where the payment is directed to be made within a certain time after service), after the expiration of one month from the entry of the decree or order, and the due expiration of the time limited, sue out either of these writs against the person by whom the payment is to be made (a).

Comparative efficacy of the two forms of procedure.—In reference to the comparative efficacy and advantage of these two forms of procedure (apart from the extent of their applicability which has been already noticed), it is to be observed that the old procedure gives at once a concurrent remedy against the body and the property. The attachment is a process against the defendant as for contempt, and his being taken into custody works no satisfaction of the claim (b), as is the case where the defendant is taken under a *ca. sa.* at common law. The person prosecuting the decree may, therefore, proceed to sequestration at the very time that the disobedient person is in custody : and, indeed, there can be no reason, if he think fit, why he should not, if circumstances render it more convenient, issue a *fi. fa.* or *elegit* while the custody continues, instead of proceeding to a sequestration.

Attachment is, therefore, commonly the first step. On the other hand, it is to be noticed that where the decree or order directs payment of money or costs, without any reference to service of the decree, and property is known to exist, the proceeding by *fi. fa.* or *elegit* is often more convenient than attachment, because it requires no previous service of the decree or order ; besides which, according to the present practice, a party may not only have a writ of attachment

(a) Consol. order xxix, rule 6. (b) *Roberts v. Ball*, 3 Sm. & Giff. 168.

after suing out a *fi. fa.* unsuccessfully, but even where the *fi. fa.* has been partially productive, he may have a writ of attachment in respect of the balance remaining due under the decree or order.

Serjeant-at-arms.—With reference to the step of obtaining an order for the Serjeant-at-arms, which the party prosecuting the decree or order may or may not resort to (as he prefers) before proceeding to sequestration, it may be mentioned that the only advantage possessed by the Serjeant-at-arms over the Sheriff is, that he can take the party who is in contempt wherever he may be found within the jurisdiction of the Court, whereas the Sheriff can only execute the attachment within his own county; that the fees of that officer are heavy; and that the option of obtaining an order for the Serjeant-at-arms is hardly ever exercised at the present day.

Under the recent practice, decrees and orders made in a matter are enforced in the same way as those made in a suit (a).

VII.—REHEARINGS AND APPEALS.

A party who is dissatisfied with a decree or order of the Court, may present a petition asking to have the cause reheard, either by the Judge who made the decree or order, or by the Lord Chancellor. A petition for rehearing before the Judge who pronounced the original order is occasionally resorted to when, through oversight or miscarriage, the case has not been properly presented to the Judge; or when unexpected complications have arisen in settling the form of decree or order before the Registrar, and it is impossible to obtain the necessary directions from the Court in the usual way by

(a) *Ex parte Belton*, 25 Beav. 368.

having the cause spoken to on the minutes, or in fact otherwise than by a formal and regular hearing. A rehearing by way of appeal is the common course where a party is dissatisfied with the decision of the Judge who originally heard the case. It is, however, to be observed that even where the object is to obtain a rehearing by way of appeal, the appeal is, *in theory*, not the removal of the cause from a subordinate Court to a higher one (as in the case of a writ of error from one of the Common Law Courts to the Court of Exchequer Chamber), but a rehearing of the same cause in the same Court by a Judge of higher judicial authority. In fact, until the decree is actually enrolled there is no limit to the power of the Court to rehear, except that neither the Master of the Rolls nor any of the three Vice-Chancellors has power to rehear decrees made by any other of such Judges, not being his own predecessor in office.

The suitor's right to a rehearing is not, however, co-extensive with the power of the Court to re-hear, as above stated, but is limited in various ways by the general practice of the Court and the recent orders.

Thus by the settled practice, where a cause has been once reheard before the Court of Appeal, there can be no further rehearing without leave obtained upon a special application (a), but the suitor may as of course have his cause first reheard by the Judge who heard it in the first instance or his successor in office, and then claim a second rehearing before the Court of Appeal, without a special application for that purpose (b). By the recent orders of the Court, there can be no appeal or rehearing after five years from the date of the decree or order complained of, unless the Lord Chancellor or Lords Justices consider that the peculiar circumstances of the case render it just and expedient to enlarge the time (c).

(a) *Moss v. Baldock*, 1 Phil. 118; *Ex parte Besley*, 3 Mac. & Gor. 287.

(b) *Maybery v. Brooking*, 7 De Gex M. & G. 673.

(c) Consol. order xxxi, rule 1.

Procedure.—The procedure in order to obtain a rehearing is as follows : A petition is presented, which in all cases except where a rehearing is sought before the Master of the Rolls of a decree or order pronounced by himself or any of his predecessors in office, is addressed to the Lord Chancellor : but in the exceptional case mentioned to the Master of the Rolls. At the foot of the draft petition is a certificate signed by two counsel as to the case being a proper one to be reheard ; but on a recent occasion when the property which formed the subject of appeal was very small, the Court allowed the petition of appeal to be set down upon the certificate of one counsel only (*a*). The petition is presented in a similar manner to that explained with respect to interlocutory petitions, and answered by directing the petition to be set down to be heard upon deposit of 20*l.* with the Registrar (*b*), and upon giving the undertaking as to costs, which will be presently mentioned. It is not, however, served in a similar manner, but the petition having been answered, is left with the Senior Registrar, who draws up an order (which follows closely the terms of the answer) to set down the petition for hearing, on the petitioner within a week depositing 20*l.* with him, and by himself or his solicitor undertaking to pay such costs, if any, as the Court may think fit to award in respect to the proceedings since the decree complained of. The deposit is required as some security for the costs of the rehearing (*c*). The order so drawn up is served on the solicitors of the opposite parties, who obtain from the Registrar an office

(*a*) *Knowles v. Greenhill*, 30 Law J. (N.S.) Chanc. 670, 3 De Gex, Fisher & Jones, 713 ; since followed in *Buckeridge v. Whalley*, 31 Law J. (N.S.) Chanc. 416, 4 De Gex, Fisher & Jones, 363, and in *Jones v. Gregory*, 33 Law J. (N.S.) Chanc. 679, 4 De Gex, Jones & Smith, 58. But the court will not depart from the ordinary rule, merely on the ground that the

appellants were represented by one counsel only in the court below. See *Re Roberts' Trust*, L. R. 4 Ch. App. 561.

(*b*) Consol. order, xxxi, rule 4.

(*c*) Consequently, when an appeal is dismissed without costs, the deposit is returned, unless the Court makes special order to the contrary, *Dell v. Barlow*, 2 Russell & Mylne, 686.

copy of the petition of rehearing, upon application for the same. Where the rehearing is by way of appeal, it may be heard, according to circumstances, either by the Lord Chancellor and Lords Justices (as constituting the full Court of Appeal), or by the Lord Chancellor alone, or by the Lord Justices alone. Upon the hearing of the appeal either party is at liberty to read and rely upon any evidence properly taken in the cause for the purpose of the original hearing, whether referred to or relied upon before the Judge below or not ; but though fresh evidence is not generally receivable, it is competent to the Court of Appeal to direct the examination *vidæ voce* of parties or witnesses though not examined in the Court below, and this power is not unfrequently exercised. Should the appeal come before the Lords Justices alone, the decree of the Court below is affirmed, unless they both concur in reversing or varying it, or express a desire that the case should be re-argued before the Lord Chancellor or before the full Court of Appeal. There appears to be no settled rule as to the costs of appeals or rehearings. Like other costs, they are in the discretion of the Court (a).

Appeals from interlocutory orders on motions or summons.—Appeals from interlocutory orders made on motion or summons, stand upon a different footing from other appeals. Orders made upon motion or summons are appealed from as follows :—If the party moving is unsuccessful below, he simply renews his motion before the Judge of Appeal, and if a party against whom the motion is made wishes to appeal, he does so by moving to discharge the order made on motion. In either case entirely new evidence is generally

(a) The old rule to the effect that a respondent, who had the decision of the Court below in his favour, could not be ordered to pay the costs of the appeal, after being broken in upon by *Powell v. Lovegrove*, 8 De Gex, M. & G. 357, and

Lillie v. Legh, 3 De Gex & Jones, 204 (followed in other cases), must be regarded as now restored, see *Denny v. Hancock*, L. R. 6 Ch. App. 138 ; *Stannard v. Lee*, *Ibidem*, 346.

receivable (a), subject only to the observation that if the view taken by the Judge below is departed from only in consequence of the newly adduced evidence, that is a material circumstance to be considered by the appellate Judge in dealing with the question of costs.

Appeals from orders on exceptions.—Orders made upon exceptions to answer, though interlocutory merely, are appealed from in the same way as already explained with respect to decrees.

Appeals from orders on petition.—Orders made upon petition are appealed from by petition of rehearing, with certificate of two counsel at the foot, but are answered and served in the same way as common petitions, and are set down to be heard with the cause petitions on petition days, instead of being in the list of re-hearings and appeals, and no deposit is required (b).

Appeals from orders on motion for decree.—Decrees and decretal orders made upon motion for decree under the practice already explained, have been, by a special order of the Court, placed upon the same footing, with respect to rehearing and appeal, as other decrees (c).

Enrolment.—The right to present a petition of rehearing or appeal may be intercepted by enrolment, after which step a decree or order can be reversed or altered only upon appeal to the House of Lords, or by bill of review. Any party may enrol a decree or order immediately after it has been passed and entered, unless some other party should have entered a *caveat*. The effect of a *caveat* is to interpose a delay of 28 days between the leaving of the docket of the decree or order for the Lord Chancellor's signature and the actual signature. Upon the docket being left, notice of that fact is given by the Record and Writ Office to the person

(a) *Pole v. Joel*, 2 De Gex & J. & Ph. 84.

285.

(c) Consol. order xxxi, rule 8.

(b) See *Richards v. Platel*, Cr.

entering the *caveat*, and unless previously to the expiration of the 28 days, a petition of appeal has been actually set down for hearing, the docket is signed as if no *caveat* had been entered, and the enrolment is then in contemplation of law complete (a). After the expiration of six calendar months from the date of a decree or order, it can only be enrolled upon special application to the Judge to whose Court the cause is attached on notice to all parties (b). After the expiration of five years no enrolment is to be allowed, subject only to the qualification that the Lord Chancellor or the Lords Justices may, *where under the peculiar circumstances of the case* it shall seem just and expedient, enlarge that period (c).

VIII.—SUMMARY STATUTORY JURISDICTION OF THE COURT.

Jurisdiction.—By various Statutes, the most important of which will be found mentioned in the list at the foot of this statement, a special summary jurisdiction is conferred upon the Court of Chancery in reference to a great variety of matters, the general nature of which is indicated in the list.

Procedure generally by petition.—As a general rule the procedure in these cases is by petition, entitled in the matter of the particular Act, and in the matter of the particular trust or other subject of the petition, marked with the name of the Lord Chancellor and of one of the Vice-Chancellors, or with the name of the Master of the Rolls, according to the selection of Court made by the petitioner's solicitor, and presented by some person authorised by the particular Statute to make the application.

(a) Consol. order xxiii, rule 27.

(b) *Ibidem*, rule 2 .

(c) *Ibidem*, rule 28.

The petition is addressed and presented in the same way as already described with respect to petitions in a cause (subject to the observation that in any exceptional case where the Master of the Rolls has no jurisdiction, the petition cannot, of course, be addressed to him), and the practice as to hearing and appeal differs little as a general rule from that which obtains with respect to cause petitions, though in all cases the limits of the jurisdiction must be sought in the particular Statute.

Peculiarities of procedure.—Some few of the Statutes, however, mentioned in the schedule, give rise to peculiarities of procedure deserving of special mention.

1. *Trustee Relief Act.*—The Trustee Relief Act has for its general object the exoneration of trustees from liability, by allowing them to pay or transfer into Court, or deposit in Court, any monies, or stocks, or securities held by them upon any trust the performance of which may have become unsafe without the direction of the Court. Under this Act the first step consists of an affidavit made by the trustee entitled in the Act and in the matter of the trust, describing the trust fund to be brought into Court, the instrument of trust affecting it, and the names of the persons interested to the best of his belief.

The subsequent proceedings relating to the trust fund are by petition, and differ little (if at all) from the general procedure applicable to the class of Statutes under consideration (a).

2. *Settled Estates Act.*—The procedure under the Acts relating to leases and sales of settled estates (19 & 20 Vict. c. 120) presents certain peculiarities (b). In proceedings under this Act, the first step is the petition. After the petition has been answered, if any married woman be a consenting party to the application, her consent is obtained by

(a) See Consol. order xli, rules 1—9.

(b) See Consol. order xli, rules 14—25, for practice under this Act.

separate examination ; and if infants who have no guardian are interested, an application is made by summons at chambers for the appointment of a guardian. As soon as the petition is properly constituted (so to speak) as respects parties, an application is made at chambers for directions as to the newspapers in which notice of the intended application is to be inserted ; and the petition does not come on for hearing until after the expiration of twenty-one days from the publication of the last of the advertisements. The subsequent procedure under this Act presents no special feature.

3. *Sir Samuel Romilly's Act*.—The procedure under the summary jurisdiction created by Sir Samuel Romilly's Act (52 Geo. 3, c. 101), presents the peculiarity of the necessity for the fiat of the Attorney-General, or, during the vacancy of that office, of the Solicitor-General, authorizing the presentation of the requisite petition. And in reference to appeals under this Act, it is to be observed that an appeal from any order made by the Master of the Rolls lies not to the Lord Chancellor but only to the House of Lords directly (*a*).

4. *Charitable Trusts Act*.—Under the Charitable Trusts Act, 1853, a jurisdiction is conferred exercisable at Chambers, and the first step under this Act is by summons (*b*).

5. *Lord St. Leonards' Act*.—Under Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 30), as subsequently amended (*c*), a trustee, executor, or administrator may, by petition or by summons at Chambers upon a written statement, (which petition or statement must be signed by counsel), obtain the opinion, advice, or direction of the Court upon any question respecting the management of the trust property or the assets of any testator or intestate.

(*a*) *Re Royston Grammar School*,
9 Law J. (N.S.) Chanc. 250;
Re Manchester College, 16 Beav.
618.

(*b*) See Consol. order xli, rules
10—13.

(*c*) By 23 & 24 Vict. cap. 38,
s. 9.

6. *Defence Act*.—Under the Defence Act, 1860 (23 & 24 Vict. c. 112), the applications relating to monies paid into Court, which in the case of other compulsory taking of lands are made by petition, are made by summons.

7. *Special cases under orders of Court*.—By one of the general orders of the Court (*a*) the summary jurisdiction of the Court, which under certain Statutes would but for that order have been exercised upon petition in open Court, is made exercisable at Chambers, in respect to the following matters, that is to say :—

- (*a*) Applications under the 36 Geo. 3, c. 52, s. 32, in all cases where the sum paid into the Bank or the stock transferred into the name of the Accountant-General under such section does not exceed 300*l.* cash or 300*l.* stock, as the case may be.
- (*β*) Applications under the Trustee Relief Acts, in all cases where the trust fund does not exceed 300*l.* cash or 300*l.* stock, as the case may be.
- (*γ*) Applications under “The Trustee Act, 1850,” and the Extension Act of 1852, in all cases where any decree or order has been made by the Court for the sale or conveyance of any real estate.
- (*δ*) Applications on behalf of infants under the Statute 1 Will. 4, c. 65, ss. 12, 16, and 17, in all cases where the infant is a ward of the Court, or the administration of the estate of the infant, or the maintenance of the infant, is under the direction of the Court.

List of Statutes conferring a summary Jurisdiction on the Court of Chancery.

Act for the Discovery of the Death of Tenants for Life and other Persons having limited Interests (6 Anne, c. 18).

(*a*) Consol. order xxxv, rule 1.

Legacy Duty Act (Infants' Legacies) 36 Geo. 3, c. 52, s. 32.

Charities Sir S. Romilly's Act (52 Geo. 3, c. 101).

Unclaimed Stock (56 Geo. 3, c. 60 ; 8 & 9 Vict. c. 62).

Property belonging beneficially to infants and *femes covert* (1 W. 4, c. 65).

Act for abolition of fines and recoveries (3 & 4 W. 4, c. 74, ss. 33, 48).

Custody of Infants (Talfourd's Act) 2 & 3 Vict. c. 54.

Defence Acts, 1842 and 1860 (5 & 6 Vict. c. 94 ; 23 & 24 Vict. c. 112).

Attornies and Solicitors' Act (6 & 7 Vict. c. 73).

Lands Clauses Consolidation Act (8 Vict. c. 18).

Trustee Relief Acts (10 & 11 Vict. c. 96 ; 12 & 13 Vict. c. 74).

Trustee Acts (13 & 14 Vict. c. 60 ; 15 & 16 Vict. c. 55).

Charitable Trusts Acts, 1853 and 1855 (16 & 17 Vict. c. 137 ; 18 & 19 Vict. c. 124).

Act authorizing infants to make settlements on marriage (18 & 19 Vict. c. 43).

Leases and sales of settled estates (19 & 20 Vict. c. 120 ; 21 & 22 Vict. c. 77).

Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 30).

(Signed)

C. CHAPMAN BARBER.

APPENDIX A.—(See p. 16.)

MARGARET APPILGARTH, WIDOW, v. THOMAS SERGEANTSON.

Bill complaining that the Defendant having obtained a sum of money of Plaintiff under a promise of marriage, has married another woman and refuses to return it.

To the right reverent Fadre in God the Bisshop of Bathe, Chaunceller of England.

Besecheth mekely Margaret Appilgarth of Yorke wydewe, that where Thomas Sergeantson of the same, at diverse tymes spak to yo^r saide besecher ful sadly and hertly in hir conceit, and sought upon hir to have hir to wyfe, desiring to have of hir certaine golde to the some of xxxvj. li for costes to bee made of their mariage, & to emploie in marchandise to his encrese & profit as to hir husbnde. Wheruppon she havynge ful byleve & trust in his trouthe & langage, nor desiring of him eeny contract of matrymoyne, delivered him the saide some at diverse tymes : aftr the which liveree furthwith he nat willing to relivere the saide some to yo^r said bisechere hathe taken to wyfe an othre woman, in grete deceit, hurt, & uttre undooyng of hir, without, yo^r gracieux help & soco^r in this partie. Please it to yo^r good grace to considre the premisses, and that yo^r saide besechere no remedy hathe by the comone lawe to get ayeine the said some ; and ther upon to graunte a writ ayeins the saide Thomas to appere afore yow at a certaine day upon a certain peyne by you to bee lymit, to bee

examined upon the premisses ; and ther upon make him to doo as good feithe & consciens wol in this partie.—And she shall pray God for yow.

INDORSED ON THE BILL.

Memorand' quod quinto die Marcij Anno regni Regis Henrici sexti decimo septimo Thomas Wytham de com' Lincoln' gentilman & Robertus Danby de com' Ebor' gentilman coram eodem domino Rege in Cancellaria sua personaliter constituti manuceperunt videlicet uterque eorum pro prefata Margareta quod ipsa in casu quo materiam in hac supplicatione specificatam veram probare non poterit tunc prefato Thome dampna & expensa que ipse ea occasione sustinebit satisfaciet juxta formam statuti (a) in hac parte editi & provisi.—*Calendars of Proceedings in Chancery*, vol. i. p. xli.

APPENDIX B.—(See p. 16.)

HENRY HOIGGES v. JOHN HARRY.

Bill praying the Chancellor to restrain the Defendant by oath from using the arts of witchcraft, &c., by which he has injured Plaintiff, on account of his having been attorney in a suit against the prior of Bodmin, in whose service the Defendant is employed.

To the ryght worthy & reverent Holyfader & his gracious lord My lord of Bathe and Chaunceler of Engeland.

Most mekely bysechit and full pytuously compleynit yor pore & contynuall bedeman Henry Hoigges of Bodmyn of the counte of Cornewayll, Gentilman, certefyying you

(a) This refers to the 17 Richard II. cap. vi., mentioned in Lecture II. p. 47, *supra*.

gracious lord hov that late on Richard Flamank of the said counte, squyer, suwyd an oyer determyner ageyn Aleyn y^e Prior of Bodmyn of the said counte, so th^t yo^r said suppliant was wthholde as atto^rney with the said Richard in the said mater: on s^r John Harry of the said toun of Bodmyn prest and servant of the said priour, of hys malys & evele wylle, ymagenyng by sotill craftys of enchauntement wycchecraft & socerye, malygnyd yo^r said suppliant endeles to destroye thurz wechecraft abowesaid, he brake his legge, and foul was hert: thurz th^e weche he was in despayr of his lyff: and more over contynualy fro day to day the said sotill craft of enchauntement wycchecraft and socerye usyth and ocuppyth, & in opyn plac' pronuncit, & to fore many other dyvers persones boldely avowith & wol stonde thereby; the weche th^t ys weel knowen to many folkys of the said counte. And more over in opyn plac' saide th^t he wolde by ye said craft of enchauntement wycchecraft and socerye, wyrke yo^r said suppliant his nekke to breke, and hym endeles to destroye, with oute yo^r gracyous lordship eide and support. Plese on to yov gracyous lord of yo^r reverent paternyte, & of yo^r hye gracyous lordschip, to considere the gret myschef harme & damage y do un to yo^r said suppliant: and also the gret myschef th^t may falle to hym here after, & to all other th^t both suturs & atto^rneys in availe to our sovereign lord the Kyng, & to ther eliant in all maters as reson & consience askyt and requyryth; yn as so moche as th^e comyn lawe may nouzt helpe; th^t ye wold fuchesef of yo^r benygne grace to graunte a writ of sub poena, dyret on to th^e said s^r John Harry, personaly to apere a fore you un to yo^r gracyous presence, at a certeyn day lyminyd up a certeyn payn, hym duwely to examyne of all said premys, ydo on to yo^r said suppliant ageyn all ryght and reson'. And moreover hym to swere to forsake his eresy wicchecraft and socerye, & also hym to redresse & reforme to a good lyf; & moreover hym to punysse in amendement and correccion of hys soule, yn exsample to all other of h^s secte.

And so to ordeyne a deu remedye & a way after yor gracyous avys and dyscreSSION, tht yor said suppliant may have hys pees, with damag & expence' & tht in the honor of God and in the wey of cheryte.—*Calendars of Proceedings in Chancery*, vol. i. p. xxiv.

APPENDIX C.—(See p. 20.)

WILLIAM DODD *v.* JOHN BROWING AND ANOTHER.

Defendants, feoffees in trust, had let Plaintiff's lands and withheld his goods without any authority.

To my worthy and gracious Lord Bisshope of Wynchestr Chancellor of Yngelond.

Beseching mekely youre povre bedeman William Dodde charyotr wheche passed overe the see in service wt our liege lorde and was oon of his charioterys in his viages; & of hyze treste ffefed in my land Johan Browning and John—hull' of Chekewell wt my wyfe, wheche Johan & Johan after azenste my wyll & wetynge pot my land to ferme, & delyvered my mevable good the valewe of xx marke where hem leste; & thus they kepe my dede & the dentre wt my mevable good unto myne undoynge, lasse than y have youre excylent & gacious helpe & lordship: besechinge yow at reverence of that worthy Prince ys sowle youre fader whoos bedeman y am evere, that ye woll sende for Johan & Johan affor seide, that the cause may be knowe why they wtholde my good to myne undoynge; also wheche am undo for brusinge in servyce of our liege lorde, & in service of yt worthy Princesse my lady of Clarence & ever wolde yef my lemys myght serve worthy prince sone. At reverence of God, and of that pereles Princes his moder take this mat' at hert of almes and charitie.—*Calendars of Proceedings in Chancery*, vol. i. p. xiii.

APPENDIX D. (*See* p. 41.)

EXTRACTED FROM RYLEY'S PLEADINGS IN PARLIAMENT,
EDITION 1661, p. 442.

Clause anno 8, E. I. m. 6 dorso in Ced.

Pur ceo ke la gent ke venent al Parlement le Roy sunt sovent deslazez et desturbez a grant grevance de eus de la curt par la multitude des petitions ke sunt botez devant le Rey de queus le plus porreient estre espleytez par Chancellor e par Justices, purveu est ke tutes les petitions ke tuchent le sel veynent primes al Chancellor, e ceus ke tuchent le Eschequer veynent al Eschequer, e ceus ke tuchent Justices v ley de terre veinent a Justices, a ceus ke tuchent Juerie veynent a Justices de la Juerie. Et si les bosoings seent si granz v si de grace ke le Chancellor e ces autres ne le pussent fere sanz le Rey, dunk il les porterunt par lur meins demeine devant le Rey pur saver ent sa volonte. Ensi qe nule petition ne veigne devaunt le Roy e son conseil fors par les mains des avaunt-ditz Chaunceller e les autres chef Ministres. Ensi ke le Rey e sun consail pussent sanz charge de autre busoignes entendre a grosses busoignes de sun reaume e de ses foreines terres.

APPENDIX E. (*See* p. 70.)

Observations on the relative Advantages and Disadvantages of the Procedures at Law and in Equity.

Starting from the second and third propositions laid down in Lecture III., p. 70, and assuming—

a.—That a scientific system of pleading to issue is essential to the working of the common law system; and

b.—That *vivâ voce* examination of witnesses in open court is an appropriate if not essential adjunct to the common law system, while it remains for further experience to determine how far it can be usefully applied to the trial of equity causes ;

I should be disposed to state the relative advantages and disadvantages of the two procedures thus :—

α.—That the common law, in being thus obliged to submit to a system of scientific pleading, suffers a disadvantage as contrasted with equity.

β.—That equity, in being deprived of *vivâ voce* examination in open court, suffers a disadvantage as contrasted with common law.

For (α) the system of pleading in equity, notwithstanding all its faults (of which prolixity is the worst) appears more calculated to work substantial justice than that of the common law.

Let us contrast the two :

Equity pleadings contain little more than the statements and counter-statements of the plaintiff and defendant, couched in language perfectly free from technicality, except so far as the subject-matter of litigation renders technical terms necessary. Thus, if the subject-matter in dispute be real estate, the technical terms belonging to the law of real property will necessarily be used ; just as, if the dispute related to (say) sugar refining, the technical terms of that process would be called into play ; but as regards the form and language of the pleadings, nothing could well be less technical.

Common law pleadings, on the other hand, being merely machinery for the production of issues, aim at conveying in concise technical language the legal effect of, or the resulting or complex fact equivalent to, the detailed facts on which the pleader relies for his attack or defence.

To state the material facts as they occurred, would be to commit the sin of pleading evidence. Thus, the *declaration* at common law contains rather a legal technical definition of the nature of the plaintiff's claim, than a statement of

facts. It is a kind of expansion of the writ. Let us, in illustration of this point, contrast a bill in Chancery by a widow seeking to recover dower with a common law count having precisely the same object. The bill would state the seisin of the husband of the particular lands, describing them with reasonable accuracy, the husband's death, and the other facts which form the foundation of the widow's claim. The declaration at law, should the widow prefer pursuing her legal remedy, would run thus :

Dorset to wit. A. B., widow, who was the wife of E. B., deceased, by —— her attorney, demands against C. D. the third part of ten messuages, ten barns, ten stables, four gardens, four orchards, two thousand acres of meadow, two thousand acres of pasture, and two thousand acres of other land, with the appurtenances, in the parish of —— in the county of —— as the dower of the said A. B. of the endowment of the said E. B., deceased, her husband, whereof she hath nothing.

Note the difference.—The bill tells its story. The count simply states the legal effect or complex fact that the plaintiff claims dower out of lands in a certain parish, held by the defendant. So in subsequent pleadings. The answer in equity tells the defendant's story in popular language. The pleadings at law give in terse technical language the complex fact resulting from the detailed facts laid before the pleader as instructions. Thus the pleader collects from his instructions that the facts may *probably* support a plea amounting in legal effect to *non-assumpsit*, i.e., a denial of the promise charged : also that the facts may *probably* prove a case amounting in law to payment : and he therefore pleads—

1. That the defendant did not promise as alleged.
2. That before action the defendant satisfied and discharged the plaintiff's claim by payment.

Hence a result which has been satirized, somewhat unfairly, in something like the following terms :—

A man sends for a hatchet, which he says he lent. The person to whom he sends says—

1. I never had it.
2. I sent it back again.
3. It was agreed I should keep it in satisfaction of 10s. you owed me.

The truth is, that the pleadings being intended to contain not detailed statements of fact, but the technical legal effect of the facts, or the complex fact equivalent to or comprised in the detailed facts, the chance of justice being defeated would be considerable, unless the litigants were held entitled to state the various possible legal effects and resulting complex facts which the detailed facts may amount to. The person pleading would otherwise in truth be subject to the very kind of difficulty to which, until recently, plaintiffs at common law were liable, in consequence of the necessity for determining beforehand within what class of wrong their case fell (*a*).

It is most interesting and instructive to trace the continual struggle to make a technical system, intended merely for the production of issues, work substantial justice. Thus, originally, to avoid multiplicity of issues, the defendant at common law was compelled to rely on one defence only. But then it was found that the wrong appreciation by the pleader of the facts might lead him to select an unsustainable defence, though the defendant might have another perfectly good answer to the action. This defect was first remedied some 150 years since, when, by the 4 Anne, cap. 16, s. 4, defendants were empowered to plead several pleas with leave of the Court.

But this only shifted the burden of injustice from the defendant's shoulders to those of the plaintiff; since the plaintiff being by the rules of pleading prohibited from replying double, a defendant frequently pleaded a long intricate plea made up of various facts, only one of which

(*a*) See Lecture I. pp. 8-10.

the plaintiff was at liberty to deny by his replication. The difficulty in which a plaintiff was placed in consequence of his inability to traverse more than one of the material facts contained in the plea, was most humorously illustrated in a *jeu d'esprit* published about three years since, called a "*Dialogue in the Shades on Special Pleading Reform.*" The speakers in the Dialogue are one *Crogate*, the plaintiff in the well-known *Crogate's Case* (a), and Baron Surrebutter, who personifies the shade, fictitious we rejoice to say, (b) of a well-known judge, now "noble" and always "facile princeps" in matters of pleading. Some of the incidents are extremely amusing. The learned judge is, on his arrival below, arraigned by Rhadamanthus, who charges him with having systematically obstructed justice during his judicial career by the frivolous technicalities of special pleading. The learned Baron, like a wary tactician, meets the charge by pleading "that special pleading was a wise and useful system, and that he had helped to remedy its defects by the new rules." He reasons thus: If Rhadamanthus denies the system to be wise and useful, he must admit that I helped to remedy it; and if he denies that I helped to remedy it, he admits the system to be wise and useful. But Rhadamanthus unceremoniously replies that the system was an abominable system, and that the Baron had made it worse by his new rules. Thereupon, the Baron *demurs* because the replication is double; but Rhadamanthus mercilessly sets aside the demurrer as frivolous, and gives judgment against the demurring party.

Finally, the injustice occasioned to plaintiffs by the rule against replying double, was remedied by the Common Law Procedure Act of 1852, which empowers as well the plaintiff as the defendant, with leave of the court or a judge, to plead several matters in any stage of the pleadings (c).

(a) 8 Reports, 67.

(b) Since these observations were written, the Judge referred to, Lord

Wensleydale, has died at an advanced age.

(c) 15 & 16 Vict. cap. 76, s. 81.

I do not feel myself qualified to express any opinion respecting the present working of the system of common law pleading as thus modified. As a general proposition, however, I am unable to resist the conclusion that any system of pleading, the object of which is, not to place upon record the actual case made by each party, but merely to reduce the controversy between them to a certain number of defined legal issues, must necessarily be exposed to degenerate into technicality at the expense of justice.

(β) Upon the disadvantage sustained by the equity system, for want of examination of witnesses in open court, I could add little to what I have already said in the body of Lecture III., at pp. 86-88. It seems to me impossible to overrate the advantages of examination in open court in cases of *conflicting evidence*. Indeed, the bare statement, that the judges who are to decide as to the facts have the opportunity of witnessing the demeanour of those whose evidence is in conflict, and of hearing the evidence itself tested by cross-examination, seems sufficient, without further comment, to establish the superiority of this mode of examination over every other. At the same time, as has been observed at page 88, it is only in a limited number of suits in equity that the want of *vivâ voce* examination is really felt.

APPENDIX F. (See p. 153.)

An Assignment by the Heir unto the Feme.

To all persons, &c., T. S., son of T. S., late of —, deceased, sendeth greeting. Whereas, the said T. S., Father of me, the said T., was, during his life, lawfully seised in his demean as of Fee of and in divers lands and tenements, of which M., late wife of the said T., and now wife of R. G., citizen of London, was, at the time of his death, indowable, and thereof ought

to have a full third part assigned limited and appointed unto her for her Dower. Now know ye that I, the said T. S., in consideration and for the Dower of her, the said M., have assigned, limited and appointed, and by these presents do assign, limit, and appoint unto the said R. G. and M., now his wife, mother of me, the said T. S., and late the wife of the said T., for the Dower of her, the said M., one piece and parcel of land, with the appurtenances, commonly called and known by the name of F., containing in the whole by estimation, &c., whether more or less, situate lying and being in, &c., and boundeth and butteth, &c., as the meets and bounds do divide and shew, and are well known, To have, &c., the said premises, with the appurtenances, unto the said R. G. and M., his wife, for the Dower of her, the said M., for and during the natural life of M., for and in the name of the reasonable dower of her, the said M. In witnesse whereof, &c.

Extracted from the "Perfect Conveyancer," printed 1655, page 190.

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